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United States v. Patane: Miranda's Excesses

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COMMENT

UNITED STATES V. PATANE: MIRANDA'S EXCESSES

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INTRODUCTION

It has been said that virtue consists essentially in "a mean between two vices, that which depends on excess and that which depends on defect . . ."[1] In *Miranda v. Arizona*,[2] the Supreme Court redressed perceived constitutional defects inherent in then-contemporary police interrogation procedures by fashioning a general exclusionary rule.[3] Linked conceptually to this rule is

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1 2 ARISTOTLE, *Nicomachean Ethics, in* THE COMPLETE WORKS OF ARISTOTLE 1747–48 (Jonathan Barnes ed., Ross Urmson trans., Princeton University Press 1984) .

2 384 U.S. 436 (1966).

3 *See id.* at 478–79 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of [a custodial] interrogation can be used against [the defendant]."); *see also* Winsett v. Washington, 860 F. Supp. 479, 481 (N.D. Ill. 1994) (noting that privilege against self-incrimination applies in any situation where individual feels compelled to testify against himself), *aff'd*, 130 F.3d 269 (7th Cir. 1997); James T. Pisciotta, Comment, Miranda *Survives To Be Heard:*

the "fruit of the poisonous tree" doctrine as explicated by the Court in *Wong Sun v. United States*,[4] which prohibits the use of evidence obtained in violation of the Constitution or derivative evidence acquired through tainted primary evidence.[5] The parallel development of these two doctrines[6] had, however, left unsettled the application of the "fruit of the poisonous tree" doctrine to derivative evidence acquired from an unwarned statement.[7] This landscape became yet more convoluted by the Court's decision in *Dickerson v. United States*,[8] which confirmed that the protections afforded by *Miranda* were constitutional rights and not merely prophylactic rules.[9] As a consequence, disagreement emerged in various circuits regarding the admissibility of physical evidence that is derivative of statements

Dickerson v. United States, 75 ST. JOHN'S L. REV. 673, 673–75 (2001) (detailing Court's creation of new evidence rule that prosecution must demonstrate use of procedural safeguards in protecting privilege from self-incrimination).

4 371 U.S. 471 (1963).

5 *See id.* at 488 (clarifying doctrinal question as "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint") (quoting Maguire, EVIDENCE OF GUILT, 221 (1959)); *see also* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (stating that fruits of noncoercive *Miranda* violations do not violate Fifth Amendment rights when warnings have occurred and derived evidence is accused party's voluntary testimony); Michigan v. Tucker, 417 U.S. 433, 450–52 (1974) (admitting testimony of witness as evidence of unconstitutional police action).

6 *See Elstad*, 470 U.S at 306 (explaining that *Miranda* violations differ from Fourth Amendment violations because Fourth Amendment exclusionary rule deters unreasonable searches on much broader scale); *see also* New York v. Quarles, 467 U.S. 649, 659–60 (1984) (excluding subsequent statements following *Miranda* violation as illegal fruits); *Tucker*, 417 U.S. at 445 (allowing evidence derived from *Miranda* violation into evidence since warning was made prior to voluntary statements); United States v. Elie, 111 F.3d 1135, 1143 (4th Cir. 1997) (announcing that whether statements were to be suppressed as tainted fruit turned on whether they were voluntarily made since *Miranda* violations are not subject to the "fruit of the poisonous tree" doctrine); Winsett v. Washington, 130 F.3d 269, 279 (7th Cir. 1997) (refusing to suppress testimony as fruit of *Miranda* violation).

7 *See* Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting) (reflecting on Court's denial of certiorari, despite fact that state and federal courts have been divided on question of whether physical evidence obtained as result of *Miranda* violations should be admissible); *see also* Massachusetts v. White, 439 U.S. 280, 280 (1978) (dividing evenly on question of admissibility and affirming lower court); Kerry F. Schonwald, *Eating the Poisonous Fruit: The Eighth Circuit Will Not Exclude Derivative Evidence From a* Miranda *Violation,* 69 MO. L. REV. 1183, 1193–96 (2004) (discussing circuit court split as to whether derived evidence can be admitted in unwarned situations).

8 530 U.S. 428 (2000).

9 *See id.* at 444 (summarizing that *Miranda* rule is constitutional and cannot be superseded by Congress); *see also* Yale Kamisar, Miranda *After* Dickerson: *The Future of Confession Law: Foreword: From* Miranda *To § 3501 To* Dickerson *To . . .*, 99 MICH. L. REV. 879, 888 (2001) (commenting on how Court dismissed its own previous view of *Miranda* in finding it to be constitutional); Pisciotta, *supra* note 3, at 684–86 (discussing Court holding that *Miranda* was constitutional despite existing exceptions).

obtained from unwarned statements.[10] The nadir of this dissension was exemplified in *United States v. Patane*,[11] in which the Tenth Circuit Court of Appeals applied the "fruit of the poisonous tree" doctrine to exclude physical evidence derived from statements acquired in violation of the defendant's *Miranda* rights.[12] However, on appeal, the Supreme Court ruled that the "fruit of the poisonous tree" doctrine does not exclude physical evidence derived from statements acquired from an unwarned statement, thereby reversing the holding and rationale of the Tenth Circuit Court of Appeals.[13]

In *Patane*, the defendant was indicted for the crime of possession of a firearm by a convicted felon.[14] However, as the Court of Appeals noted, the story properly begins with the defendant's prior arrest for harassing and menacing his ex-girlfriend.[15] He was released from custody on June 3, 2001, subject to a restraining order that prohibited him from contacting his ex-girlfriend in the ensuing seventy-two hours.[16] Three days later, the Bureau of Alcohol, Tobacco, and Firearms informed the local police that the defendant was a convicted felon who

[10] *See* United States v. Villalba-Alvarado, 345 F.3d 1007, 1020–21 (8th Cir. 2003) (reversing lower court's suppression of physical evidence and partial suppression of post-warning statement); United States v. Faulkingham, 295 F.3d 85, 94 (1st Cir. 2002) (reversing grant of suppression motion on physical evidence); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (permitting gun found from unwarned police action to be submitted into evidence); United States v. DeSumma, 272 F.3d 176, 180–81 (3d Cir. 2001) (holding "fruit of poisonous tree" doctrine inapplicable to evidence derived from unwarned statement and allowing admission of gun).

[11] 304 F.3d 1013 (10th Cir. 2002), *rev'd*, 124 S. Ct. 2620 (2004).

[12] *See id.* at 1029 (indicating that fulfillment of *Miranda's* deterrent purpose would not be achieved unless physical fruits of violation were suppressed along with statement); *see also* Abraham v. Kansas, 67 Fed. Appx. 529, 534 (10th Cir. 2003) (holding that circuit court's decision was controlling in regards to derived physical fruit, but that it would not be impacted by subsequent Supreme Court decision); *Villalba-Alvarado*, 345 F.3d at 1018 (declining to follow circuit court's extension of "fruits" doctrine).

[13] *See* United States v. Patane, 124 S. Ct. 2620, 2630 (2004) (reiterating that statements taken with improper *Miranda* warnings are presumed coerced only for certain purposes and then only to protect against self-incrimination); *see also* United States v. Ross, 113 Fed. Appx. 884, 884–85 (10th Cir. 2004) (referencing *Patane* in concluding that failure to follow *Miranda* procedures did not taint fruit derived from unwarned voluntary statements); United States v. Renken, No. 02 CR 1099, 2004 U.S. Dist. LEXIS 21707, at *16–17 (N.D. Ill. Oct. 27, 2004) (following *Patane* in rejecting defendant's argument that evidence derived from unwarned statements should be suppressed).

[14] *See Patane*, 304 F.3d at 1014 (discussing how arrest occurred from results of two separate investigations).

[15] *See id.* (indicating release from arrest for harassing and menacing ex-girlfriend was subject to temporary restraining order).

[16] *See id.* at 1014–15 (revealing that communication prohibitions included in person or by phone, directly or indirectly).

possessed a .40 caliber Glock firearm.[17] At about the same time, the police responded to a call from the defendant's ex-girlfriend concerning a purported violation of the restraining order.[18] After arresting and handcuffing the defendant, the police began to advise him of his *Miranda* rights.[19] However, before the police concluded, the defendant stated that he knew his rights and no further *Miranda* Warnings were given.[20] The police then inquired as to whether the defendant possessed any firearms, to which the defendant replied, "[t]he Glock is in my bedroom on a shelf, on the wooden shelf."[21] The police then entered the defendant's home, found the firearm in the indicated location, and seized it.[22] At the subsequent suppression hearing, the district court suppressed the firearm based on its determination that the police did not have probable cause to arrest the defendant.[23] The Government appealed this order,[24] and the Court of Appeals, while finding that probable cause existed to arrest the defendant,[25] affirmed the district court's order because the evidence was discovered as a result of the defendant's unwarned statements.[26] The Government then sought, and was granted, a writ of certiorari by the Supreme Court.[27]

Relying on *Dickerson*, the Tenth Circuit ruled that physical evidence derived from a defendant's unwarned statements is inadmissible.[28] The *Patane* court found that the sparingly few

17 *See* United States v. Patane, 304 F.3d 1013, 1014–15 (10th Cir. 2002) (noting that record did not reveal how probation officer knew that gun existed), *rev'd* 124 S. Ct. 2620 (2004).

18 *See id.* (discussing how ex-girlfriend was afraid for her safety because she knew Patane was in possession of gun and list of people he wanted to kill).

19 *Id.* at 1015 (stating that detective got no further than right to remain silent).

20 *Id.* (noting that government conceded that this was *Miranda* violation).

21 *Id.*

22 *Id.* (noting that officer received permission from defendant to retrieve gun).

23 United States v. Patane, 304 F.3d 1013, 1014 (10th Cir. 2002) (discussing insufficiency of evidence leading up to arrest), *rev'd* 124 S. Ct. 2620 (2004).

24 *Id.* at 1014–16 (noting government's argument that defendant did not violate his restraining order).

25 *Id.* at 1018 (holding that there was sufficient evidence that defendant violated domestic violence restraining order).

26 *Id.* at 1029 (holding that "fruit of the poisonous tree" doctrine may apply to physical fruits of *Miranda* violation).

27 United States v. Patane, 538 U.S. 976 (2003) (granting certiorari).

28 *Patane*, 304 F.3d at 1029 (holding that physical fruits of *Miranda* violation must be suppressed).

pre-*Dickerson* decisions[29] dealing with this issue were no longer controlling.[30] The court maintained that although *Oregon v. Elstad*,[31] *Michigan v. Tucker*,[32] and *New York v. Quarles*[33] declined to apply the "fruit of the poisonous tree" doctrine within the *Miranda* context,[34] the rationale motivating those decisions was no longer compelling given the *Dickerson* holding.[35] In so doing, the Tenth Circuit explicitly rejected the post-*Dickerson* holdings of the Third and Fourth Circuits,[36] and dramatically extended the post-*Dickerson* holding of the First Circuit.[37] The Supreme Court, however, reversed the decision of the Tenth Circuit and, in so doing, ruled that *Miranda* is a "prophylactic constitutional rule" that does not mandate the suppression of physical evidence derived from its violation.[38]

[29] *See* New York v. Quarles, 467 U.S. 649, 665–72 (1984) (O'Connor, J., concurring in part and dissenting in part) (suggesting that willful *Miranda* violation should have broader exclusionary application); *see also* United States v. McCurdy, 40 F.3d 1111, 1117 (10th Cir. 1994) (noting that *Elstad* established that failure to provide *Miranda* warnings alone does not compel suppression of "fruits" of the statement). *But see* Kastigar v. United States, 406 U.S. 441, 445 (1972) (stating that Supreme Court has been zealous to protect privilege against self incrimination).

[30] United States v. Patane, 304 F.3d 1013, 1022–23 (10th Cir. 2002) (reviewing effects of *Dickerson* holding on circuit courts), *rev'd* 124 S. Ct. 2620 (2004).

[31] 470 U.S. 298 (1985).

[32] 417 U.S. 433 (1974).

[33] 467 U.S. 649 (1984).

[34] United States v. Patane, 304 F.3d 1013, 1019 (10th Cir. 2002) (noting that those cases were decided on now-overruled idea that *Miranda* rule was prophylactic in nature), *rev'd* 124 S. Ct. 2620 (2004).

[35] *Id.* (stating that *Dickerson* fundamentally changed earlier premise); *see* Dickerson v. United States, 530 U.S. 428, 444 (2000) (concluding that *Miranda* announced constitutional rule that may not be superseded legislatively); *see also* Abraham v. State, 211 F. Supp. 2d 1308, 1322–23 (D. Kan. 2002) (acknowledging that *Dickerson* holding altered 'prophylactic' rule).

[36] *Patane*, 304 F.3d at 1027 (declining to adopt position that "fruits" doctrine can never apply to *Miranda* violations); *see* United States v. Sterling, 283 F.3d 216, 218–19 (4th Cir. 2002) (holding that physical fruits of *Miranda* violation should never be suppressed; United States v. DeSumma, 272 F.3d 176, 180–81 (3d Cir. 2001) (holding that "fruit of the poisonous tree" doctrine does not apply to derivative physical evidence); *see also* United States v. Villalba-Alvarado, 345 F.3d 1007, 1017 (8th Cir. 2003) (noting that *Patane* rejected method followed by Third and Fourth Circuits).

[37] *Patane*, 304 F.3d at 1029 (declining to adopt *Faulkingham's* view that physical fruits of negligent *Miranda* violations are admissible); *see* United States v. Faulkingham, 295 F.3d 85, 93 (1st Cir. 2002) (discussing court's unwillingness to say that derivative evidence may *never* be suppressed); *see also* United States v. Gilmore, 03-CR-0030-C-01, 2004 U.S. Dist. LEXIS 4912, at *14–20 (D. Wis. March 16, 2004) (discussing extension from inadmissibility based on intentional violations to inadmissibility regardless of intent).

[38] United States v. Patane, 124 S. Ct. 2620, 2626 (2004) ("The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context.")

This Comment will argue, as the Supreme Court held, that the Tenth Circuit erred by applying the "fruit of the poisonous tree" doctrine so as to exclude physical evidence derived from a negligent *Miranda* violation. It is further asserted that the application of the "fruit of the poisonous tree" doctrine within the context of intentional *Miranda* violations, as was the case in *United States v. Faulkingham*,[39] is also without merit. Consequently, this Comment maintains that the decision of the Supreme Court, that the "fruit of the poisonous tree" doctrine should not exclude physical evidence derived from a negligent *Miranda* violation, is correct but should be extended to encompass intentional as well as negligent *Miranda* violations.

I. THE DEVELOPMENT OF *MIRANDA* AND THE "FRUIT OF THE POISONOUS TREE" DOCTRINE

In *Miranda* the Court provided for more effective protections of a criminal defendant's Fifth Amendment right not to have compelled statements used against him at trial[40] than were previously available. The Court held that statements made by a defendant in the course of a custodial interrogation were generally inadmissible against him in the prosecution's case-in-chief unless the defendant was provided with appropriate warnings and executed a voluntary and knowing waiver of rights.[41] However, the exclusionary rule developed in *Miranda* is not absolute;[42] the Court has created exceptions that do not bar

[39] 295 F.3d 85 (1st Cir. 2002).

[40] Miranda v. Arizona, 384 U.S. 436, 479 (1966) (stating that necessary warnings include: right to remain silent, anything you say can be used against you in a court of law, right to the presence of an attorney, and that if you cannot afford attorney, one will be appointed for you prior to any questioning); *see also Dickerson*, 530 U.S. at 443 (stating that *Miranda* warnings have "become embedded in routine police practice to the point where the warnings have become part of our national culture"); Oregon v. Elstad, 470 U.S. 298, 304–05 (1985) (noting that prior to *Miranda*, admissibility revolved around voluntariness, but statements which were voluntary could nonetheless be coerced).

[41] *Miranda*, 384 U.S. at 478–79 (stating that these "procedural safeguards" are necessary to protect accused's right against self incrimination); *see Dickerson*, 530 U.S. at 440 (asserting that "the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored"). *See generally* Harris v. New York, 401 U.S. 222, 225–226 (1971) (allowing statements not admissible under *Miranda* to be admitted on prosecution's case in chief to attack accused's credibility).

[42] *Dickerson*, 530 U.S. at 441 (clarifying that decisions after *Miranda* which sculpted exceptions to rules articulated in that case stand only for proposition that "no constitutional rule is immutable"); *see* Oregon v. Hass, 420 U.S. 714, 722–23 (1975) (noting that statements obtained in violation of *Miranda* may be used to attack accused's credibility because court cannot knowingly allow perjury that would pervert

the use of evidence acquired from an unwarned statement.[43] Analogous to this exclusionary rule is the "fruit of the poisonous tree" doctrine,[44] which suppresses evidence that is the "fruit" of a search or seizure in violation of the Fourth Amendment.[45]

A. The Development of Miranda and Fifth Amendment Jurisprudence

The *Miranda* Court determined that custodial surroundings and *then*-contemporary interrogation procedures obscured the distinctions between voluntary and involuntary statements and thereby between genuine and fabricated statements.[46] A survey of *then*-contemporary police practices indicated that more effectual protections were necessary to preserve a defendant's Fifth Amendment rights.[47] Before the *Miranda* decision, the admissibility of custodial confessions turned on whether the

administration of justice); *Harris*, 401 U.S. at 225–226 (holding that statements not admissible on prosecution's case in chief due to *Miranda* may be used to attack accused's credibility).

43 *See Elstad*, 470 U.S. at 314 (stating that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement"); New York v. Quarles, 467 U.S. 649, 653 (1984) (finding that public safety concerns may trump necessity of giving *Miranda* warning in certain situations). *See generally* Michigan v. Tucker, 417 U.S. 433, 445–46 (1974) (noting that when police conduct occurred before *Miranda* decision, the conduct "did not abridge [defendant's] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by th[e] Court in *Miranda* to safeguard that privilege").

44 Wong Sun v. United States, 371 U.S. 471, 484–86 (1963) (discussing exclusionary rule and "fruit of the poisonous tree" doctrine); *see* United States v. Byram, 145 F.3d 405, 409–10 (1st Cir. 1998) (comparing exclusionary rule and "fruit of the poisonous tree" doctrine); *see also* Winsett v. Washington, 860 F. Supp. 479, 482–83 (N.D. Ill. 1994) (noting similarities between Fourth Amendment and *Miranda* exclusionary rules), *aff'd*, 130 F.3d 269 (7th Cir. 1997).

45 *Wong Sun*, 371 U.S. at 485 (holding that there is no appreciable difference between tangible and verbal evidence and thus both may be suppressed as "fruits of the poisonous tree"); *see Winsett*, 860 F. Supp. at 482–83 (discussing Fourth Amendment and *Miranda* exclusionary rules). *See generally Dickerson*, 530 U.S. at 450–57 (discussing relationship between *Miranda* and "fruit of the poisonous tree" doctrine).

46 Miranda v. Arizona, 384 U.S. 436, 457 (1966) (noting difficulty in determining voluntariness when situations like these exist); *see Dickerson*, 530 U.S. at 434–35 (noting risk that coercive police tactics will elicit involuntary statements). *See generally* Quarles, 467 U.S. at 654 (asserting that "[t]he *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive").

47 *Miranda*, 384 U.S. at 445–58 (summarizing and surveying landscape of interrogation procedures used to illicit confessions from accused). *See Dickerson*, 530 U.S. at 433–37 (reiterating circumstances that led Court to lay down constitutional guidelines to govern admissibility of confessions obtained by police). *See generally* Chambers v. Florida 309 U.S. 227, 237 (1940) (noting that coercion can be accomplished through either mental or physical means).

confession was voluntary and whether a defendant's will was overcome.[48] Dissatisfaction with the pre-*Miranda* voluntariness standard prompted the Court to fashion the exclusionary rule,[49] which provided that courts must not admit custodial confessions obtained from a defendant without the benefits of appropriate warnings and without a voluntary and knowing waiver of rights.[50]

B. Exceptions to the Exclusionary Rule in Miranda

The constitutional imperatives of the Fifth Amendment led the Court to generally prohibit the admission of evidence realized from an unwarned statement.[51] Yet the Court did not contemplate the exclusion of all such evidence. Indeed, in *Harris v. New York*[52] and in *Oregon v. Hass*,[53] statements obtained in violation of Miranda were held to be admissible so as to impeach the defendant's testimony.[54] The Court noted that the deficiency of *Miranda* warnings did not so corrupt the statement's worth,

[48] *Dickerson*, 530 U.S. at 432–36 (discussing development of law governing admissibility of suspect confessions and voluntariness test); *see* Bram v. United States, 168 U.S. 532, 542 (1897) (stating that "a confession, in order to be admissible, must be free and voluntary"); *see also* Malloy v. Hogan, 378 U.S. 1, 6–7 (1964) (reiterating test announced in *Bram v. United States,* which governed admissibility of confessions).

[49] *See Miranda*, 384 U.S. at 444–45 (stating holding of *Miranda*). *See generally Dickerson*, 530 U.S. at 432–36 (discussing history and problems with voluntariness standard pre-*Miranda); Bram*, 168 U.S. at 534 (providing survey of law governing admissibility of confessions before *Miranda* decision).

[50] *Miranda*, 384 U.S at 478–79 (summarizing that privilege against self-incrimination must be "scrupulously honored"); *see Dickerson*, 530 U.S. at 434–35 (noting that guidelines laid down in *Miranda* were to guide both courts and law enforcement officers). *See generally* New York v. Quarles, 467 U.S. 649, 654 (1984) (noting that *Miranda* warnings insure that right against self-incrimination is protected).

[51] *See Miranda*, 384 U.S at 479 ("[T]he Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged."); *see also* Oregon v. Elstad, 470 U.S. 298, 305 (1985) (stating that *Miranda* warnings are designed to protect constitutional right against self-incrimination). *See generally* Harris v. New York, 401 U.S. 222, 224 (1971) (noting that constitutional imperatives do not require use of voluntary statements obtained in violation of *Miranda* to be used to attack accused's credibility).

[52] 401 U.S. 222 (1971).

[53] 420 U.S. 714 (1975).

[54] *See Hass*, 420 U.S. at 722–24 (noting that though *Miranda* bars use of accused's statements in case in chief, these statements may be used to attack accused's credibility); *Harris*, 401 U.S. at 224 (finding that statements that are inadmissible on prosecution's case in chief may nonetheless be admissible to impeach the accused if they are otherwise trustworthy); *see also* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 302 (1996) (noting how courts have allowed statements taken in violation of *Miranda* to impeach witnesses credibility).

for impeachment purposes, so long as that statement was not coerced or otherwise involuntary.[55]

In *New York v. Quarles*,[56] the Court held that unwarned statements and evidence derived from those statements are admissible when public safety would be imminently endangered by any delay in acquiring the evidence.[57] The Court indicated that an unwarned statement concerning the location of a firearm, and the firearm itself, were admissible because the defendant had discarded the gun in a crowded supermarket.[58] Thus, when "the need for answers to questions . . . outweighs the need for the prophylactic rule [of *Miranda*]," both primary and derivative evidence are admissible.[59]

In *Michigan v. Tucker*,[60] the defendant was provided with only the warnings that were necessary prior to the *Miranda* decision,[61] which did not include the right to free counsel.[62] After executing a waiver of rights,[63] the defendant identified a potential alibi witness.[64] However, this witness contradicted the asserted defense,[65] and this evidence was used by the prosecution

55 *See Hass*, 420 U.S. at 722–24 (noting that statements used for impeachment, though obtained in violation of *Miranda*, were not "involuntary or coerced"); *Harris*, 401 U.S. at 224 (holding that statements used to impeach must still otherwise meet evidentiary standards for trustworthiness); *see also* Dickerson v. United States, 530 U.S. 428, 452 (2000) (Scalia, J., dissenting) (discussing cases that allowed statements taken in violation of *Miranda* to be used for impeachment purposes).

56 467 U.S. 649 (1984).

57 *Quarles*, 467 U.S. at 651 (holding that this result was compelled by "overriding considerations of public safety").

58 *Id.* at 657 (stating that failure to give *Miranda* warnings was excused by risk to public safety).

59 *Id.*

60 417 U.S. 433 (1974).

61 *Id.* at 447–48 (stating that right to counsel warning was not provided); *see* Johnson v. New Jersey, 384 U.S. 719, 732 (1966) (holding that *Miranda* "should not be applied retroactively"); *see also* Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (deciding right to counsel is violated only if police are conducting inquiries into specific suspects, not conducting general investigations).

62 *Tucker*, 417 U.S. at 436 (stating police advised defendant of his right to remain silent); *see* Michael R. Hartman, Note, *A Critique of* United States v. Bin Laden *in Light of* Chavez v. Martinez *and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269, 272 (2004) (stating there was no requirement that police warn defendants of their rights prior to *Miranda*); *see also* Susan L. Ross, Comment, Davis v. United States*: The Ambiguous Request for Counsel*, 30 NEW ENG. L. REV. 941, 943-44 (1996) (noting that *Miranda* stressed "the right to have an attorney present during interrogation").

63 *Tucker*, 417 U.S. at 436 (stating that defendant did not desire legal counsel).

64 *Id.* at 436–37 (noting that police contacted defendant's potential alibi witness).

65 *Id.* at 436–37 (1974) (indicating that defendant's story was discredited rather than bolstered by witness' statement).

in its case-in-chief.[66] The Court expressly declined to apply the "fruit of the poisonous tree" doctrine so as to suppress the derivative witness testimony uncovered through an unwarned statement.[67] "This Court has also said, in [*Wong Sun*], that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed . . . [but] in deciding whether [defendant's] testimony must be excluded, there is no controlling precedent of this Court to guide us."[68]

In *Oregon v. Elstad*,[69] the defendant made a statement while in custody but prior to receiving *Miranda* warnings.[70] Subsequently, the defendant was given *Miranda* warnings and made yet another statement.[71] The Court held that the warned statements need not be suppressed because of the initial *Miranda* violation.[72] In so doing, the application of the "fruit of the poisonous tree" doctrine in such an instance was rejected[73] for as the Court indicated, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied . . . by barring use of the unwarned statement in the case in chief."[74] Thus, as in *Tucker*, the Court declined to apply the "fruit of the poisonous tree" doctrine in the context of a *Miranda* violation.[75]

66 *Id.* at 437 (stating that testimony by defendant's alibi witness was admitted).

67 *Id.* at 446–52 (stating that public policy would not be served by excluding testimony of defendant's alibi witness).

68 *Id.* at 445–46.

69 470 U.S. 298 (1985).

70 *Id.* at 301 (stating defendant was interrogated at home before taken into custody).

71 *Id.* (noting that defendant continued to waive his rights).

72 *Id.* at 317–18 (holding that courts cannot presume coercion when *Miranda* is violated if statement was otherwise voluntary). *See generally* Nardone v. United States, 308 U.S. 338, 341 (1939) (deciding that prosecutors have sufficient opportunity to prove that possibly tainted evidence was independently gathered).

73 *See Elstad*, 470 U.S. at 305–06 (noting difference between procedural *Miranda* violation and Fourth Amendment violations for purposes of exclusion); *see also* V. Lakshmi Arimilli, *Confessions and the Tennessee Constitution*, 25 U. MEM. L. REV. 637, 652–53 (1994) (explaining that *Elstad*, in rejecting defendant's "fruit of the poisonous tree" argument, noted that "Miranda rights substantially differ from those rights protected by the Fourth and Fifth Amendments"). *See generally* Clifford S. Fishman, *Electronic Tracking Devices and the Fourth Amendment:* Knotts, Karo *and the Questions Still Unanswered*, 34 CATH. U. L. REV. 277, 350 (1985) (noting that courts have rejected notions that all evidence discovered by police misconduct can be excluded under "fruit of the poisonous tree" doctrine).

74 *Elstad*, 470 U.S. at 318.

75 *See id.* at 317–18 (1985) (holding that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite warnings"); *see also* Michigan v. Tucker,

C. Development of the "Fruit of the Poisonous Tree" Doctrine

The Court in *Wong Sun v. United States*[76] articulated what has come to be known as the "fruit of the poisonous tree" doctrine.[77] This doctrine, which functions in a manner similar to the exclusionary rule in *Miranda*,[78] prohibits the use of evidence obtained in violation of the Constitution or derivative evidence acquired through tainted primary evidence.[79] Before the *Wong Sun* decision, the admissibility of derivative evidence turned simply on the notion that "[t]he essence of [an evidentiary] provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[80]

The infeasibility and inflexibility of this strain of jurisprudence led the Court in *Wong Sun* to hold that only evidence "come at by exploitation" of an unconstitutional act is inadmissible derivative evidence.[81] Moreover, the "fruit of the poisonous tree" doctrine applies unless the connection between the Fourth Amendment

417 U.S. 433, 446–52 (1974) (observing that defendants cannot expect police to be completely flawless).

76 371 U.S. 471 (1963).

77 *Id.* at 485 (holding "fruit of the poisonous tree" doctrine "bar[s] from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion"); *see* Mark S. Bransdorfer, Note, Miranda *Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L. J. 1061, 1073 (1987) (stating that *Wong Sun* does not present bright line rules for "fruit of the poisonous tree" analyses); *see also* Leslie-Ann Marshall Shelby Webb, Jr., Note, *The Burger Court's Warm Embrace Of An Impermissibly Designed Interference With The Sixth Amendment Right To The Assistance of Counsel: The Adoption Of The Inevitable Discovery Exception To The Exclusionary Rule*: Nix v. Williams, 28 HOW. L. J. 945, 965 (1985) (noting that *Wong Sun* devised methods for determination of which evidence is "fruit of the poisonous tree").

78 *See Wong Sun*, 371 U.S. at 484–86 (discussing exclusionary rule and "fruit of the poisonous tree" doctrine); *see also* United States v. Byram, 145 F.3d 405, 409–10 (1st Cir. 1998) (noting that *Miranda* violation does not automatically lead to exclusion under "fruit of the poisonous tree" doctrine); Winsett v. Washington, 860 F. Supp. 479, 482 (N.D. Ill. 1994) (noting similarities and differences between *Miranda* exclusionary rule and "fruit of the poisonous tree" doctrine), *aff'd*, 130 F.3d 269 (7th Cir. 1997).

79 *See Wong Sun*, 371 U.S. at 484–86 (defining exclusionary rule); *see also* United States v. Patane, 124 S. Ct. 2620, at 2629–30 (2004) (noting how *Wong Sun* excludes illegally obtained evidence derived from it); *Winsett*, 860 F. Supp. at 482 (stating that "[t]he fruit of the poisonous tree doctrine . . . mandates the exclusion of evidence secured as a result of unlawful searches and seizures").

80 Silverthorne Lumber Co., Inc., v. United States, 251 U.S. 385, 392 (1920); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 74–5 (1964) (asserting that evidence obtained by illegal means was not admissible in court); *see also* Nardone v. United States, 308 U.S. 338, 340–43 (1939) (granting defendant new trial upon finding evidence had been gathered in violation of law).

81 *Wong Sun*, 371 U.S. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)).

violation and the derivative evidence is too attenuated.[82] The passage of time or "a break in events" determines attenuation.[83] Significantly, the "fruit of the poisonous tree" doctrine has generally been applied so as to exclude only evidence that is derived from a Fourth Amendment violation.[84] Indeed, subsequent to *Wong Sun*, courts have indicated that the Fifth Amendment prohibition on the use of involuntary statements and the *Miranda* exclusionary rule are constitutionally distinct[85] and that derivative physical evidence must be suppressed as per the "fruit of the poisonous tree" doctrine only if it was discovered by exploiting an illegal search, for example, through a Fourth Amendment violation.[86] However, the application of the "fruit of the poisonous tree" doctrine to derivative evidence acquired through primary evidence that was in turn obtained from an

[82] *See Wong Sun*, 371 U.S. at 487–88 (noting connection between illegal conduct and evidence derived can become so attenuated as to limit application of this doctrine); *see also Nardone*, 308 U.S. at 341 (acknowledging situations where causal connection between Fourth Amendment and derivative evidence becomes "so attenuated as to dissipate the taint"); Brent D. Stratton, *Criminal Law: The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 140–41 (1984) (defining attenuation exception to exclusionary rule).

[83] *See* New York v. Harris, 495 U.S. 14, 29–30 (1990) (Marshall, J., dissenting) (discussing that passage of time and intervening circumstances contribute to attenuation); *see also* United States v. Leon, 468 U.S. 897, 910–11 (1984) (defining "dissipation of taint"); Taylor v. Alabama, 457 U.S. 687, 690, 694 (1982) (naming several factors for court to consider in determining attenuation, including passage of time and intervening causes); Dunaway v. New York, 442 U.S. 200, 217–18 (1979) (considering closeness in time and existence of intervening factors); Brown v. Illinois, 422 U.S. 590, 591–92, 599, 602 (1975) (mentioning two factors contemplated by court with respect to attenuation).

[84] *See Wong Sun*, 371 U.S. at 485–86 (relating Fourth Amendment to "fruit of the poisonous tree" doctrine); *see also* United States v. Elie, 111 F.3d 1135, 1140 (4th Cir. 1997) (noting that derivative evidence is suppressed only if it was found due to police exploitation of illegality); Winsett v. Washington, 860 F. Supp. 479, 482 (N.D. Ill. 1994) (describing derivation of "fruit of poisonous tree" doctrine from Fourth Amendment), *aff'd*, 130 F.3d 269 (7th Cir. 1997). *But see* United States v. Wade, 388 U.S. 218, 235–36 (1967) (discussing rights of parties with respect to identifications before and at trial); *Murphy*, 378 U.S. at 79 (stating issues with exclusionary rule relating to Fifth Amendment). *See generally Silverthorne*, 251 U.S. at 392 (discussing "independent source" theory).

[85] Winsett v. Washington, 130 F.3d 269, 273–74 (7th Cir. 1997) (stating that "the two protections are constitutionally distinct"); *see Elie*, 111 F.3d at 1142 (explaining that statement that is "voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"); *Winsett*, 860 F. Supp. at 482 n.2 (noting applications of doctrine to violations of both Fifth and Sixth Amendment).

[86] *Elie*, 111 F.3d at 1143 (noting that *Miranda* violations can never be "fruit of the poisonous tree"); *see also Winsett*, 860 F. Supp. at 482 (suggesting that "fruit of the poisonous tree" doctrine is generally applicable to Fourth Amendment violations). *See generally* Alan C. Yarcusko, Note, Brown *to* Payton *to* Harris: *A Fourth Amendment Double Play by the Supreme Court*, 43 CASE WES. RES. L. REV 253, 266–68 (1992) (discussing Fourth Amendment exclusionary rule).

unwarned statement remained unsettled following the decision of the Tenth Circuit in *United States v Patane*.[87]

II. *DICKERSON* AND ITS CONSEQUENCES

The already convoluted legal landscape concerning the application of the "fruit of poisonous tree" doctrine within the context of a *Miranda* violation became yet more convoluted following the Court's decision in *Dickerson*.[88] The Court in *Dickerson* indicated that *Miranda* was a constitutional rule that could not be superseded by legislation,[89] and while the Court rejected the prophylactic rationale used to create the exceptions in earlier jurisprudence,[90] it did not overrule any of these cases.[91] Rather, the Court incorporated the prophylactic *Miranda* exceptions directly into its holding.[92] The Court noted that "our decision in [*Elstad*] – refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases . . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[93] This seeming paradox, that *Miranda* is a constitutional rule and that *Elstad*, *Quarles*, and *Tucker* remain good law, engendered disagreement among the circuits regarding the application of the "fruit of the poisonous tree" doctrine to

87 304 F.3d 1013 (10th Cir. 2002); *see* Patterson v. United States, 485 U.S. 922 (1988) (denying certiorari); Massachusetts v. White, 439 U.S. 280 (1978) (affirming lower court dismissal).

88 Dickerson v. United States, 530 U.S. 428 (2000).

89 *Dickerson*, 530 U.S. at 437–38, 444 (recognizing authority of *Miranda*); *see* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (emphasizing supremacy of *Miranda* rule); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (noting *Miranda* as constitutional rule in *Dickerson*).

90 *Dickerson*, 530 U.S. at 437–38; *see* United States v. Villalba-Alvarado, 345 F.3d 1007, 1011 (8th Cir. 2003) (noting rejection that protections provided by *Miranda* were "not merely prophylactic"); *Sterling*, 283 F.3d at 219 (recognizing Dickerson Court's preference for *Miranda's* "constitutional significance").

91 *Dickerson*, 530 U.S. at 432 (recognizing continued validity of previous cases); *see Villalba-Alvarado*, 345 F.3d at 1012 (claiming validity of *Elstad* remained after *Dickerson*); *see also Sterling*, 283 F.3d at 219 (acknowledging survival of cases like *Tucker* and *Elstad*).

92 *Dickerson*, 530 U.S. at 432 ("*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation."); *see Villalba-Alvarado*, 345 F.3d at 1012 (stating that *Miranda's* established exceptions were still in effect); *Sterling*, 283 F.3d at 219 (suggesting that *Dickerson* court allowed exceptions to survive when affirming *Miranda*).

93 *Dickerson*, 530 U.S. at 441.

physical evidence derived from an unwarned statement.[94] However, this dissension was, to some degree, alleviated by the Supreme Court's holding in *Patane*.[95]

A. The Approach of the Third, Fourth, and Eighth Circuits

In *United States v. DeSumma*,[96] *United States v. Sterling*,[97] and *United States v. Villalba-Alvarado*,[98] the Third, Fourth, and Eighth Circuits respectively held that the "fruit of the poisonous tree" doctrine does not apply so as to exclude physical evidence acquired through an unwarned statement.[99] In *Villalba-Alvarado*, officers conducted controlled drug buys and then obtained a search warrant that allowed for the search of the defendant's car, home, and person.[100] After encountering the defendant in his car near his home, the officers stopped, handcuffed, and escorted the defendant to his home.[101] There, without the benefit of *Miranda* warnings, the defendant voluntarily confessed to the location of narcotics and currency.[102] The court held that the narcotics and currency were admissible although the evidence was derived from an unwarned

94 *See Villalba-Alvarado*, 345 F.3d at 1017–18 (comparing post-*Dickerson* cases in various circuit courts); United States v. Patane, 304 F.3d 1013, 1019 (10th Cir. 2002) (stating that *Dickerson* "undermined the logic underlying *Tucker* and *Elstad*"), *rev'd*, 124 S.Ct. 2620 (2004); United States v. Faulkingham, 295 F.3d 85, 93 (1st Cir. 2002) (acknowledging coexistence of these cases remaining good law); *see also Sterling*, 283 F.3d at 219 (maintaining that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"); United States v. DeSumma, 272 F.3d 176, 180–181 (3d Cir. 2001) (holding that "fruit of the poisonous tree" doctrine does not apply to voluntary statements before *Miranda* warnings).

95 United States v. Patane, 124 S. Ct. 2620, 2624 (2004) (holding *Miranda* violation does not exclude physical fruits of voluntary, though unwarned, statements); *see* United States v. Ross, 113 Fed. Appx. 884, 886 (10th Cir. 2004) (noting Supreme Court's decision to overrule Tenth Circuit's decision in *Patane*); United States v. Sasson, 334 F. Supp. 2d 347, 372 (E.D.N.Y. 2004) (stating that "the privilege against self-incrimination does not bar the admission of fruits of confessions obtained in violation of *Miranda*").

96 272 F.3d 176 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002).

97 283 F.3d 216 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002).

98 345 F.3d 1007 (8th Cir. 2003).

99 *Id.* at 1020–21 (allowing physical evidence discovered by police to be admissible at trial); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (ruling that shotgun found through unwarned statement was properly admitted into evidence); *DeSumma*, 272 F.3d at 180–81 (holding that doctrine does not apply to derivative evidence secured by voluntary statement obtained before *Miranda* warnings).

100 *Villalba-Alvarado*, 345 F.3d at 1008 (noting events of procuring and utilizing warrant).

101 *Id.* (explaining that upon recognizing defendant in his car, officers arrested him near his home).

102 *Id.* (stating that defendant voluntarily told officers where evidence was located).

statement.[103] In holding thus, the court determined that the "fruit of the poisonous tree" doctrine did not apply so as to exclude derivative physical evidence acquired through an initial *Miranda* violation.[104] As the court noted "we refuse to interpret Dickerson as having altered the exclusionary rule [of *Miranda*] in a manner that would . . . not permit the admission of derivative physical evidence."[105]

Similarly, in *DeSumma*, a federal agent inquired whether any weapons were in the possession of an arrested but unwarned defendant.[106] The defendant indicated that there was a firearm in his vehicle,[107] which was subsequently discovered.[108] The court held that the firearm was admissible though acquired from an unwarned statement.[109] In so doing, the court applied the reasoning espoused in *Dickerson*,[110] which distinguished the protections afforded by the Fourth Amendment from those provided by the Fifth Amendment.[111] The court indicated that the suppression of the unwarned statements was the appropriate remedy for the *Miranda* and Fifth Amendment violation[112] and thus "the *Miranda* presumption . . . does not require that the . . . fruits [of the statements] be discarded as inherently tainted."[113]

103 *Id.* (reversing lower court decision that physical evidence should be suppressed).

104 United States v. Villalba-Alvarado, 345 F.3d 1007, 1019 (8th Cir. 2003) (applying voluntariness standard to determine admissibility of evidence derived from *Miranda* violation).

105 *Id.*

106 United States v. DeSumma, 272 F.3d 176, 178 (3d Cir. 2001) (explaining how agent asked defendant about weapons in his possession).

107 *Id.* at 178 (citing defendant's answer that weapon was in his car).

108 *Id.* (noting defendant gave agents his car pad combination).

109 *Id.* at 181 (holding pistol as properly admitted).

110 Dickerson v. United States, 530 U.S. 428, 441 (2000) (distinguishing unreasonable searches under Fourth Amendment from unwarned interrogation under Fifth Amendment); *see DeSumma*, 272 F.3d at 180 (citing *Dickerson* in reaching rationale for its holding); *see also* Schonwald, *supra* note 7, at 1183 (pointing out split in courts regarding whether or not "fruit of the poisonous tree" doctrine should apply to evidence obtained through unwarned statements).

111 *Dickerson*, 530 U.S. at 441 (justifying its distinction between Fourth and Fifth Amendment protections); *see DeSumma, 272* F.3d at 180 (basing its holding on *Dickerson* distinction); s*ee also* Schonwald, *supra* note 7, at 1185 (explaining *Dickerson*'s language regarding difference between Fourth and Fifth Amendment jurisprudence).

112 United States v. DeSumma, 272 F.3d 176, 180–81 (3d Cir. 2001) (ruling that unwarned statements are still not admissible without *Miranda* specifications); *see* Kirsten Lela Ambach, Miranda's *Poison Fruit Tree: The Admissibility of Physical Evidence Derived from and Unwarned Statement*, 78 WASH. L. REV. 757, 774–75 (2003) (clarifying court's reaffirmation of *Miranda* as constitutional rules); Schonwald, *supra* note 7, at 1193 (explaining split amongst circuits and court's decision in *DeSumma* regarding *Mirandized* statements).

113 *DeSumma*, 272 F.3d at 179 (quoting Oregon v. Elstad, 470 U.S. 298, 307 (1985)).

As a result, the Third Circuit declined to apply the "fruit of the poisonous tree" doctrine so as to suppress derivative physical evidence acquired from an unwarned statement.[114]

And in *Sterling*, the court held that the "fruit of the poisonous tree" doctrine did not apply to physical evidence derived from an unwarned statement.[115] The police, in the course of an arrest,[116] without first administering *Miranda* warnings,[117] asked whether the defendant had any weapons.[118] The defendant indicated that there was a firearm in his truck,[119] which was subsequently discovered by the police.[120] The court held that the firearm was admissible because the "fruit of the poisonous tree" doctrine does not apply in the context of a *Miranda* violation.[121] Utilizing the same rationale employed in *DeSumma*,[122] the court noted that "the Court's reference to and reaffirmation of *Miranda*'s progeny [in *Dickerson*] indicates that the established exceptions, like those in *Tucker* and *Elstad*, survive."[123] Consequently, the Fourth Circuit also declined to make use of the "fruit of the poisonous tree" doctrine so as to exclude physical evidence

114 *DeSumma*, 272 F.3d at 180 (holding doctrine as not applicable to physical evidence obtained through unwarned statements); *see* Ambach, *supra* note 112, at 774 (announcing Third Circuit's refusal to apply fruits doctrine to physical fruits of *Miranda* violation); *see also* Schonwald, *supra* note 7, at 1194 (concluding that Third Circuit interpreted *Dickerson* as allowing such evidence as admissible).

115 United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (holding physical evidence obtained through unwarned statement as admissible at trial).

116 *Id.* at 217–8 (noting police responded to domestic disturbance call); *see* Ambach, *supra* note 112, at 775 (recounting facts of *Sterling*).

117 *Sterling*, 283 F.3d at 218 (describing conversation between officers and defendant); *see* Ambach, *supra* note 112, at 775 (noting that defendant was "unwarned").

118 *Sterling*, 283 F.3d at 218 (stating questions asked by officers).

119 *Id.* (noting defendant voluntarily told police about the shotgun).

120 *Id.* (indicating defendant was subsequently charged with possession of both guns).

121 United States v. Sterling, 283 F.3d 216, 218 (asserting that "there is no exclusionary rule that pertains to violations of *Miranda* when physical evidence is seized"); *see* Schonwald, supra note 7, at 1194 (comparing *Sterling* and *DeSumma*).

122 *See* United States v. DeSumma, 272 F.3d 176, 180–81 (3d Cir. 2001) (holding that "fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued"); *see also* Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1354 n.97 (2003) (noting that *Sterling* and *DeSumma* had similar holdings); Schonwald, *supra* note 7, at 1193–94 (describing that in both *Sterling* and *DeSumma* the court found distinction between admissibility of statements under Fifth Amendment and derivative evidence under Fourth Amendment).

123 *Sterling*, 283 F.3d at 219; *see* Schonwald, *supra* note 7, at 1194 (stating that Court interpreted *Dickerson* holding to indicate that *Miranda* exceptions were not overruled).

derived from primary evidence acquired from an unwarned statement.[124]

B. The First Circuit Approach

In *United States v. Faulkingham*, the First Circuit held that the "fruit of the poisonous tree" doctrine applied so as to exclude derivative physical evidence acquired through intentional violations of *Miranda*,[125] not merely negligent police acts.[126] In *Faulkingham*, the defendant made inculpatory statements to drug enforcement officers prior to receiving *Miranda* warnings.[127] These statements led to the derivative testimony of a co-conspirator[128] as well as a quantity of drugs.[129] However, there was no evidence that the police intentionally withheld the defendant's *Miranda* warnings.[130] The court held that the derivative evidence in this matter ought not to be suppressed,[131] as the *Miranda* violation could not be seen as willful or intentional.[132] Thus, the First Circuit limited the application of the "fruit of the poisonous tree" doctrine so as to exclude evidence

[124] *Sterling*, 283 F.3d at 218 (allowing evidence to be admitted); *see* Schonwald, *supra* note 7, at 1194 (stating court's holding); *see also* Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 74 n.101 (2002) (stating that Fourth Circuit declined to suppress physical evidence of an un-*Mirandized* confession).

[125] United States v. Faulkingham, 295 F.3d 85, 93–94 (1st Cir. 2002) (reversing defendant's motion to suppress evidence).

[126] *Id.* (explaining court's holding).

[127] *Id.* at 87–88 (noting magistrate judge's statement that agent "understood that he had a suspect in custody that he intended to interrogate"); *see* Schonwald, *supra*, note 7, at 1194 (reiterating facts of *Faulkingham*).

[128] *Faulkingham*, 295 F.3d at 88 n.1 (noting that co-conspirator cooperated with government and became witness against defendant); *see* Ambach, *supra* note 112, at 776 (describing that defendant's unwarned statements led officers to drug supplier, who became state's witness against defendant).

[129] *Faulkingham*, 295 F.3d at 88–89 (indicating seizure of drugs); *see* Ambach, *supra* note 112, at 776 (noting that defendant's unwarned statements led officer's to drug supplier, who in turn led officer's to heroin).

[130] *Faulkingham*, 295 F.3d at 93–94 (noting that there was no coercive or deliberate misconduct by agents); *see* Ambach, *supra* note 112, at 776 (stating that there was no evidence that police deliberately failed to give defendant proper warnings).

[131] United States v. Faulkingham, 295 F.3d 85, 94 (1st Cir. 2002) (reversing lower court's grant of suppression motion); *see* Schonwald, *supra* note 7, at 1195 (noting that court admitted derivative evidence).

[132] *Faulkingham*, 295 F.3d at 93–94 (noting that while officers acted negligently, they did not deliberately fail to provide *Miranda* warnings); *see* Ambach, *supra* note 112, at 776 (stating that court can still admit derivative evidence of an un-*Mirandized* warning where officer's failure to do so is not deliberate).

derived from an intentional violation of a defendant's *Miranda* rights.[133]

C. The Tenth Circuit Approach

In *Patane*, the Tenth Circuit held that the "fruit of the poisonous tree" doctrine applied so as to exclude derivative physical evidence acquired through both negligent and intentional *Miranda* violations.[134] As indicated above,[135] the defendant in *Patane* interrupted the police before they had concluded administering *Miranda* warnings.[136] Subsequently, the defendant indicated that he had a firearm in his possession,[137] which was recovered by the police.[138] The court held that the firearm should be excluded, as it was acquired through *Miranda* violation.[139] Consequently, the Tenth Circuit dramatically extended the reasoning of the *Faulkingham* court and applied the "fruit of the poisonous tree" doctrine so as to exclude evidence derived from any type of *Miranda* violation.[140]

[133] *Faulkingham*, 295 F.3d at 93 (stating that role of deterrence was weaker in this case because it was not officers' intention to elicit statements from defendant); *see* Mannheimer, *supra* note 124, at 74 n.101 (noting court's holding as allowing suppression of evidence where police deliberately failed to provide *Miranda* warnings but not where police acted negligently); *see also* Schonwald, *supra* note 7, at 1195 (concluding that First Circuit left open possibility that fruits of the poisonous tree would be suppressed where police deliberately fail to provide *Miranda* warnings).

[134] United States v. Patane, 304 F.3d 1013, 1028–29 (10th Cir. 2002) (suppressing physical fruits of *Miranda* violation), *rev'd*, 124 S. Ct. 2620 (2004); *see* Schonwald, *supra* note 7, at 1195–96 (examining court's holding in *Patane*).

[135] *See supra* notes 11–31, 33–39 and accompanying text.

[136] *Patane*, 304 F.3d at 1015 (stating that defendant interrupted *Miranda* warnings as they were being given by arresting police officers).

[137] *Id.* (stating that defendant informed police that he had .357 that was in police custody and Glock on his dresser); *see* Nicole L. Angarella and Peter Bowman Rutledge, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 180 (2004) (noting that defendant subsequently filed motion to suppress firearm in District Court).

[138] *Patane*, 304 F.3d at 1015 (stating that firearm was recovered by police).

[139] *Id.* at 1029 (stating that physical evidence that resulted from *Miranda* violation should be excluded); *see* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (stating that "unless and until such [*Miranda*] warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]").

[140] United States v. Patane, 304 F.3d 1013, 1029 (10th Cir. 2002) (stating that limiting "fruit of the poisonous tree" doctrine to intentional violation would depend on subjective intent of police officer and would present extreme evidentiary difficulties), *rev'd*, 124 S. Ct. 2620 (2004).

III. THE PLURALITY OPINION OF THE SUPREME COURT

In *United States v. Patane*, the Court ruled, in a plurality opinion, that the failure to give a suspect the warnings prescribed by *Miranda* does not require the suppression of the physical "fruits" of a suspect's unwarned but voluntary statements.[141] The plurality explained that the *Miranda* rule is a prophylactic tenet that is employed so as to guard against violations of the Self-Incrimination Clause of the Fifth Amendment.[142] However, the plurality noted that the Self-Incrimination Clause "is not implicated by the admission into evidence of the physical fruit of a voluntary," though unwarned, statement.[143] Accordingly, the plurality concluded that "there is no justification for extending the *Miranda* rule to this context."[144] The plurality maintained that the *Miranda* rule is not a code of police conduct, and thus the police do not violate the Constitution, or even the *Miranda* rule, by the mere failure to administer warnings at the outset of a custodial interrogation.[145] Thus, the "fruit of the poisonous tree" doctrine, as developed by the Court in *Wong Sun v. United States*, does not apply to evidence derived from a *Miranda* violation.[146]

141 United States v. Patane, 124 S. Ct. 2620, 2630 (2004) (holding that admission of physical fruits present no risk that defendant's coerced statements will be used against him in court).

142 *Patane*, 124 S. Ct. at 2626–27 (2004) (stating that *Miranda* warnings aren't codes of police conduct, but rules designed to protect core rights); *see* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating that *Miranda* warnings and other procedural safeguards act to "provide practical reinforcement for the right against compulsory self-incrimination"); *see also* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (asserting that "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself").

143 *Patane*, 124 S. Ct. at 2626–27 (stating that Self-Incrimination Clause is not implicated by admission of "physical fruit," because it only applies to statements of defendant); *see* New York v. Quarles, 467 U.S. 649, 671 (1984) (noting that interrogation which results in additional evidence is similar to compulsory taking of blood samples); *see also* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (holding that "fruit" doctrine never applies to derivative evidence obtained from unwarned statement that was voluntary under Fifth Amendment).

144 *Patane*, 124 S.Ct. at 2626.

145 *Id.* (explaining that unwarned statement is not equivalent to compelled statement for purposes of Fifth Amendment); *see* Miranda v. Arizona, 384 U.S. 436, 490 (1966) (stating that Congress and States are free to develop their own safeguards for Fifth Amendment privilege, as long as safeguards are effective); *see also* Oregon v. Elstad, 470 U.S. 298, 307 (1985) (noting that lack of warnings creates legal presumption of coercion, not an automatic violation of Fifth Amendment).

146 *Patane*, 124 S. Ct. at 2630 (declining to extend *Wong Sun* to "mere" failures of police officer to give *Miranda* warnings); *see Sterling*, 283 F.3d at 219 (stating that derivative evidence coming from unwarned, voluntary statement does not fall within

The plurality further noted that the core protection afforded by the Self-Incrimination Clause of the Fifth Amendment is "a prohibition on compelling a criminal defendant to testify against himself at trial."[147] Thus, the Constitution seemingly cannot be violated by the introduction of non-testimonial evidence derived from voluntary, though unwarned, statements.[148] Further, the plurality found an analogous constitutional proposition in *Oregon v. Elstad* to be persuasive, to wit: "that statements taken without *Miranda* warnings . . . can be used to impeach a defendant's testimony at trial."[149] The plurality noted that "generally, the Miranda rule 'does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted.'"[150] Indeed, "[s]uch a blanket suppression rule could not be justified by reference to the 'Fifth Amendment goal

scope of "fruit of the poisonous tree" rule, although *Miranda* rules cannot be overruled by legislative action); *see also* Leading Case, *Fifth Amendment – Testimonial Fruits*, 118 HARV. L. REV. 296, 302–303 (2004) (arguing that distinguishing between *Miranda* warnings and "poisoned fruit" doctrine for derivative evidence would result in narrow test for "poisoned fruit" doctrine based on voluntary nature of statement, resulting in "a hierarchy of Self-Incrimination Clause violations").

147 United States v. Patane, 124 S. Ct. 2620, 2626 (2004); *see Chavez*, 538 U.S. 764–768 (limiting application of self incrimination privilege to criminal proceedings, not criminal investigations); *see also* United States v. Hubbell, 530 U.S. 27, 49–56 (2000) (Thomas, J., concurring) (explaining that privilege might extend to bar compelled production of any incriminating evidence, testimonial or otherwise); JOHN HENRY WIGMORE, 8 J. WIGMORE, EVIDENCE § 2263, at 378 (J. McNaughton rev. ed. 1961) (explaining that Clause "was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence").

148 *See Patane*, 124 S. Ct. at 2631 (noting that derivative evidence admitted in this matter does not run risk of violating defendants right against self-incrimination, and has significant probative value if reliable); United States v. Reynolds, 334 F. Supp. 2d 909, 912–3 (W.D. Va. 2004) (stating that "[i]ntroduction of non-testimonial evidence obtained as a result of voluntary statements does not violate the Self-Incrimination Clause"); *see also* Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101, 124 (2004) (positing that Court's holding illustrates that right against self-incrimination only relates to exclusion of testimonial evidence, which would make inclusion of non-testimonial evidence constitutional).

149 *Patane*, 124 S. Ct. at 2627 (explaining limitations of *Miranda* rule); *see* Oregon v. Elstad, 470 U.S. 298, 307–08 (1985) (noting that for unwarned statements "the primary criterion of admissibility [remains] the 'old' due process voluntariness test") (quoting Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981)); *see also* New Jersey v. Portash, 440 U.S. 450, 457–59 (1979) (noting distinction between voluntary and compelled statements); Harris v. New York, 401 U.S. 222, 225 (1971) (stating that privilege granted by Fifth Amendment "cannot be construed to include the right to commit perjury").

150 *Patane*, 124 S. Ct. at 2628 (quoting *Elstad*, 470 U.S. at 307).

of assuring trustworthy evidence' or by any deterrence rationale."[151]

Furthermore, the plurality emphasized the exclusionary concept inherent within the textual mandate of the Self-Incrimination Clause, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[152] It drew a distinction between this exclusionary rule and the Fourth Amendment's protection against unreasonable searches, by noting that "the Self-Incrimination Clause is self-executing. We have repeatedly explained 'that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements . . . in any subsequent criminal trial.'"[153] This textual mandate and self-executing protection creates "a strong presumption against expanding the *Miranda* rule any further."[154]

Moreover, the plurality indicated that "nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations."[155] For in *Dickerson*, the Court went to great pains to note that "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming [*Miranda's*] core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[156] This explication of the scope of *Miranda*'s protections, to wit: "unwarned statements may not be used as evidence in the prosecution's case in chief," limits, as the plurality noted, the protections of the Self-Incrimination Clause.[157] In addition, the reliance and incorporation of *Elstad*, *Tucker*, and *Quarles* in *Dickerson*, seemingly confirmed the

151 *Id.* (quoting *Elstad*, 470 U.S. at 308); *see* Michigan v. Tucker, 417 U.S. 433, 446–49 (1974) (stating that *Miranda* rule doesn't contemplate police work without any error); *see also Harris*, 401 U.S. at 225–26 (explaining limits of *Miranda* rule in context of impeachment).

152 U.S. CONST. amend. V.

153 United States v. Patane, 124 S. Ct. 1260, 2628 (quoting Chavez v. Martinez, 538 U.S. 760, 769 (2003)).

154 *Patane*, 124 S. Ct. at 1268.

155 *Patane*, 124 S. Ct. at 2628 (citations omitted).

156 *Id.* (quoting Dickerson v. United States, 530 U.S. 428, 443–44 (2000)).

157 *See id.* at 2628–29 (explaining interaction between Fifth Amendment and holding in *Miranda*); *see also* New York v. Quarles, 467 U.S. 649, 656–57 (1984) (limiting protections of *Miranda* through public safety exception). *But see* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result.")

validity of the preceding proposition.[158] Thus, as the plurality curtly concluded, "nothing in *Dickerson* calls into question our continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it."[159] However, while reaching the correct holding, the plurality did not comment on the application of the foregoing principles to an intentional rather than negligent *Miranda* violation.[160] Thus, the plurality reversed the decision of the Tenth Circuit and, as a consequence, established the intellectual underpinnings of post-Dickerson analysis with respect to both the "fruit of the poisonous tree" doctrine and the Fifth Amendment.[161]

IV. THE "FRUIT OF THE POISONOUS TREE" DOCTRINE DOES NOT APPLY SO AS TO EXCLUDE PHYSICAL EVIDENCE DERIVED FROM A *MIRANDA* VIOLATION

The Tenth Circuit erred by applying the "fruit of the poisonous tree" doctrine so as to exclude physical evidence derived from a negligent *Miranda* violation.[162] The "fruit of the poisonous tree"

158 *Dickerson*, 530 U.S. at 454 (advancing "[t]he proposition that failure to comply with *Miranda's* rules does not establish a constitutional violation was central to the holdings of *Tucker*, *Hass*, *Quarles*, and *Elstad*"); *see Patane*, 124 S. Ct. at 2628 (positing "[t]he Court's reliance on our *Miranda* precedents, including both *Tucker* and *Elstad*, further demonstrates the continuing validity of those decisions"); *see also* Leading Case, *supra* note 146, at 299–300 (commenting that in *Patane*, "Justice Kennedy, concurring in the judgment . . . agreed that Dickerson had not undermined the exceptions to Miranda created in Harris, Quarles, and Elstad").

159 United States v. Patane, 124 S. Ct. 2620, 2628 (2004).

160 *See generally Patane*, 124 S. Ct. at 2628 (declining to mention intent when deciding "that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule"); United States v. Faulkingham, 295 F.3d 85, 93–4 (1st Cir. 2002) (noting "no reason to think that the agents deliberately failed to give the warning in order to get the physical evidence"); Lt. Co. David H. Robertson, *Self-Incrimination: Big Changes in the Wind*, 2004 ARMY LAW. 37, 49 (2004) (commenting on Tenth Circuit's finding "that the deterrent effect of suppressing negligent violations also, would help ensure that officers were properly trained to protect this important constitutional right of its citizens").

161 *Patane*, 124 S. Ct. at 2630 (reversing judgment of Tenth Circuit Court of Appeals). *See generally* Angarella & Rutledge, *supra* note 137, at 181 (noting plurality's decision that "while *Dickerson* characterized *Miranda* as a constitutional rule, it did not override the requirement of a 'close fit' between the core constitutional right and the exclusionary remedy"); John H. Blume ET. AL., *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 345 n.91 (2005) (asserting that *Patane* "erased any doubts as to whether *Dickerson* might have overturned prior Court rulings that 'fruit of the poisonous tree' analysis would not apply to *Miranda*").

162 *Patane*, 124 S. Ct. at 2630 (holding that although "it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient Miranda warnings are presumed to

doctrine does not mandate the suppression of physical evidence derived from a statement acquired absent *Miranda* warnings.[163] The reasoning of the Court in *Elstad* and *Tucker*, as well as the casting of *Miranda* as a constitutional rule,[164] does not support such a dramatic expansion of the "fruit of the poisonous tree" doctrine.[165] In fact, such an expansion would mark a significant departure from *Miranda*'s purpose[166] and would unduly burden

have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination"). *But see* United States v. Patane, 304 F.3d 1013, 1027 (10th Cir., 2002) (choosing to "decline to adopt the position of the Third and Fourth Circuits that the Wong Sun fruits doctrine never applies to Miranda violations"). *See generally* Leading Case, *supra* note 146, at 296 (articulating holding of *Patane* as "physical evidence derived from unwarned voluntary statements is admissible at trial").

163 *See* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963) (explaining that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police"); *see also* United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997) (finding it "well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation. As a result, we hold that Wong Sun and its 'fruit of the poisonous tree' analysis is inapplicable in cases involving mere departures from Miranda"); Winsett v. Washington, 130 F.3d 269, 279 (7th Cir. 1997) (noting that "even where an interrogation occurs after the *Miranda* decision, and warnings required by it are not given, the deterrent effect of excluding third party testimonial fruits of an otherwise voluntary statement is not sufficient to warrant exclusion"). *But see* United States v. Wade, 388 U.S. 218, 241 (1967) (applying test for admissibility of illegally obtained identification evidence as "whether, granting the establishment of the primary illegality, the identification evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint"); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (holding "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him"); Silverthorne Lumber Co., Inc., v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

164 *See Patane*, 124 S. Ct. at 2628 (acknowledging *Dickerson* established *Miranda* as constitutional rule); Dickerson v. United States, 530 U.S. 428, 432 (2000) (concluding that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress"); Victoria Newnham Matthews, Miranda *Rule is a Constitutional Rule:* Dickerson v. United States, 27 AM. J. CRIM. L. 421 (2000) (acknowledging "in Dickerson v. United States, the United States Supreme Court upheld Miranda v. Arizona, declaring that decision a constitutional rule which Congress cannot supersede").

165 *See* United States v. Patane, 124 S. Ct. 2620, 2628 (2004) (stating that "fruit of the poisonous tree doctrine" does not apply to *Miranda* violations); *see also* Angarella & Rutledge, *supra* note 137, at 180–181 (noting plurality opinion in *Patane* favored per se rule that *Miranda* violations do not require suppression of physical evidence); Leading Case, *supra* note 146, at 298–99 (explaining in *Patane* "Thomas conceded that the Court had sometimes created prophylactic rules that 'necessarily swept beyond the actual protections of the Self-Incrimination Clause' but maintained that 'any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination'").

166 *See Patane*, 124 S. Ct. at 2627 (noting Fifth Amendment goal of providing "trustworthy" evidence); *Dickerson*, 530 U.S. at 435 (noting that *Miranda* established rule for admissibility of *statements*); Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding that "to permit a full opportunity to exercise the privilege against self-incrimination, the

the truth seeking purpose of criminal trials.[167] Consequently, the "fruit of the poisonous tree" doctrine should not and indeed does not apply so as to exclude physical evidence derived from unwarned statements.[168]

A. *Dickerson Does Not Warrant the Application of the "Fruit of the Poisonous Tree" Doctrine in the Miranda Context*

The Tenth Circuit found support for extending the "fruit of the poisonous tree doctrine" in the *Miranda* context based on the Court's decision in *Dickerson*, which recognized that *Miranda* is a constitutional rule.[169] However, nothing in the recognition that *Miranda* is a constitutional rule suggests that the "fruit of the poisonous tree" doctrine applies to *Miranda* violations.[170] To the contrary, the Court's decision in *Dickerson* relied on existing

accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored").

167 *See Dickerson*, 530 U.S. at 444 (acknowledging *Miranda's* downside as some guilty defendants may go free); *see also* Withrow v. Williams, 507 U.S. 680, 690 (1993) (positing that *Miranda* is prophylactic in nature because it may bar evidence that is not actually involuntary); Oregon v. Elstad, 470 U.S. 298, 309 (1985) (stating that "[i]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself"). *See generally* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (clarifying that *Miranda* rights "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); Harris v. New York, 401 U.S. 222, 226 (1971) (holding that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances").

168 *Patane*, 124 S. Ct. at 2629 (concluding "[t]here is therefore no reason to apply the 'fruit of the poisonous tree' doctrine" to physical evidence derived from unwarned statements); *see* United States v. Lewis, 110 Fed. Appx. 569, 572 (6th Cir. 2004) (following *Patane* that "failure to give a suspect *Miranda* warnings does not require suppression of physical fruits of that suspect's unwarned but voluntary statements"); United States v. Reynolds, 334 F. Supp. 2d 909, 911–12 (W.D. Va. 2004) ("The Supreme Court held in a recent plurality opinion that failure to advise a defendant of his *Miranda* rights does not require suppression of the physical fruits of the defendant's unwarned, but voluntary, statements.").

169 United States v. Patane, 304 F.3d 1013, 1023 (10th Cir., 2002) (arguing "*Dickerson* has undercut the premise upon which that application of *Elstad* and *Tucker* was based because *Dickerson* now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation"), *rev'd*, 124 S. Ct. 2620 (2004); *Dickerson*, 530 U.S. 431; *see* Mannheimer, supra note 124, at 129 n.101 (commenting that *Patane* and *Faulkingham* both relied on fact that *Dickerson* held *Miranda* as constitutionally based).

170 *See* United States v. Faulkingham, 295 F.3d 85, 91 (1st Cir. 2002) (noting Supreme Court "has used broad language, discouraging the use of the fruits doctrine following a Miranda violation, whatever the nature of the derivative evidence"); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (noting derivative evidence obtained as result of voluntary, though unwarned statement, is never "fruit of the poisonous tree"); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (stating no constitutional violation occurs with use of evidence derived from voluntary statement).

limits to the *Miranda* rule as a basis for declining to overrule *Miranda*.[171] Further, *Dickerson* does not undermine the analytical foundations of cases such as *Elstad* and *Tucker*.[172] *Dickerson*'s recognition that the *Miranda* rule is constitutional in origin does not mean that a failure to give warnings is equivalent to actual coercion.[173]

The Tenth Circuit indicated that "*Dickerson* undermined the logic underlying *Tucker* and *Elstad*."[174] In reaching its conclusion that the *Miranda* rule was a "constitutional decision,"[175] however, the Court in *Dickerson* referred explicitly and favorably to *Elstad*'s rejection of the "fruit of the poisonous tree" doctrine.[176] *Dickerson*, therefore, did not change the established proposition detailed in *Elstad* that limited the scope of the "fruit of the poisonous tree" doctrine in the *Miranda* context.[177] Indeed,

171 Dickerson v. United States, 530 U.S. 428, 443–444 (2000) (recalling "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief"). *See generally* United States v. Patane, 124 S. Ct. 2620, 2629–30 (2004) (noting "*Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it"); Conor G. Bateman, Case Note, Dickerson v. United States, Miranda *is Deemed a Constitutional Rule, but Does it Really Matter?*, 55 ARK. L. REV. 177, 192–193 (2002) (noting that *Dickerson* Court relied on Court's creation of exceptions to *Miranda* rule).

172 *See Patane*, 124 S. Ct. at 2628 (stating that *Dickerson* does not call into question court's continued insistence that close connection between Self-Incrimination Clause and any rule created to protect it be maintained); *see also Faulkingham*, 295 F.3d at 93 (asserting that *Dickerson* cited *Elstad* without overruling it, by recognizing fact that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *Dickerson*, 530 U.S. at 443–44 (noting that cases subsequent to *Miranda* have reaffirmed its core ruling).

173 *See Faulkingham*, 295 F.3d at 93–94 (stating that, based on facts of this case, failure of agents to give *Miranda* warnings was not tantamount to actual coercion); *see also Sterling*, 283 F.3d at 219 (establishing that *Miranda* only held that certain warnings must be given to admit suspect's statements made during custodial interrogation into evidence); *DeSumma*, 272 F.3d at 180 (holding that "fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement").

174 *Patane*, 304 F.3d at 1019.

175 *Dickerson*, 530 U.S. at 432.

176 *Id.* at 441 (explaining that court's refusal to apply traditional "fruits" doctrine in *Elstad* does not prove that *Miranda* is a non-constitutional decision, but merely demonstrates that unreasonable searches under Fourth Amendment are different from unwarned interrogations under Fifth Amendment).

177 Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (concluding that cases subsequent to *Miranda* have not undermined its doctrinal underpinnings); Oregon v. Elstad, 470 U.S. 298, 314 (1985) (stating that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement"); *see* Bateman, *supra* note 171, at 219 (noting that "[i]n Dickerson, it appears that the Supreme Court has again affirmed the principle that derivative evidence may be admitted against the defendant if the taint has been sufficiently purged").

the Court in *Dickerson* placed critical reliance on the continuing validity of its post-*Miranda* cases, including *Tucker* and *Elstad*, explaining that those cases had "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[178] *Dickerson* thus maintained the difference between the admissibility of unwarned statements in the government's case in chief and the admissibility of evidence derived from an unwarned voluntary statement.[179] And as noted above, *Tucker* and *Elstad* maintain that evidence derived from unwarned statements is admissible,[180] so long as the unwarned statements were voluntary under the traditional due process test.[181]

B. Extending Miranda's Exclusionary Rule Burdens the Truth-Seeking Function of Criminal Trials

While *Miranda* may be a constitutional decision,[182] the nature of the constitutional rights implicated in *Miranda* are of paramount importance in considering the consequences of the

178 *Dickerson*, 530 U.S. 443–44.

179 *See* United States v. Faulkingham, 295 F.3d 85, 94 (2002) (indicating that while facts of this case do not implicate any Fourth Amendment concerns, facts of other cases might and should be determined accordingly); *see also* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (reaffirming that distinction between statements and derivative evidence survives *Dickerson*); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (stating that distinction exists between evidence obtained from voluntary statement and evidence obtained from unreasonable search or coerced confession).

180 *See Elstad*, 470 U.S. at 306 (asserting that confessions obtained after an illegal arrest should be excluded from evidence unless an intervening occurrence breaks the connection between the arrest and confession); *see also* Michigan v. Tucker, 417 U.S. 433, 446–52 (1974) (holding that police's failure to fully give respondent his *Miranda* warnings did not require exclusion of evidence obtained from the statement); State of Washington v. Lozano, 882 P.2d 1191, 1193 (1994) (stating that "[o]nly evidence obtained in which violations of the right to Miranda warnings involve actual coercion will result in suppression as 'fruits of the poisonous tree'").

181 *See Elstad*, 470 U.S. at 300 (holding that voluntary statement given after *Miranda* warnings is admissible, despite prior unwarned statements, so long as neither was coerced); *see also* United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997) (concluding that exceptions outlined in *Tucker* and *Elstad* supported holding that evidence obtained as a result of unwarned, voluntary statement is never "fruit of the poisonous tree"). *See generally Faulkingham*, 295 F.3d at 85 (illustrating case where derivative evidence obtained from an unwarned, voluntary statement is admissible).

182 Dickerson v. United States, 530 U.S. 428, 440 (2000) (asserting that *Miranda* rule is constitutional in nature); *see* United States v. Chen, 104 F. Supp. 2d 329, 333 (S.D.N.Y. 2000) (noting *Dickerson* opinion and its ruling that *Miranda* is constitutional rule); *see also* United States v. Kruger, 151 F. Supp. 2d 86, 101 (D. Me. 2001) (finding that *Dickerson* "changed the landscape" by conferring constitutional status on *Miranda* warnings).

Dickerson decision.[183] A statement given without the warnings mandated by *Miranda* does not, standing alone, constitute compulsion as understood in Fifth Amendment jurisprudence.[184] Instead, *Miranda* created an evidentiary rule designed to prohibit the use of a compelled statement.[185] Thus, *Miranda* developed an exclusionary rule for only unwarned statements.[186] The admission of physical evidence derived from voluntary unwarned statements does not implicate the possibility that a compelled statement will be used.[187] Consequently, physical evidence acquired from unwarned statements does not fall within the scope of the exclusionary rule.[188] To suppress physical evidence acquired in this manner would constitute an unwarranted extension of *Miranda* at an excessive cost to the truth-seeking function of a criminal trial.[189] The costs of

183 *See Faulkingham*, 295 F.3d at 94 (stating importance of making a determination of which constitutional rights are implicated in particular case); *see also Sterling*, 283 F.3d at 219 (analyzing *Dickerson's* conclusion that *Miranda* is with constitutional significance). *See generally DeSumma*, 272 F.3d at 180 (demonstrating different ways that constitutional rights are implicated).

184 *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding volunteered statements of any kind are not barred by Fifth Amendment); *see also* Colorado v. Connelly, 479 U.S. 157, 170 (1986) (discussing nature and effect of coercion by police). *See generally* Fare v. Michael, 442 U.S. 707 (1979) (providing explanation of police coercion and illustrating case devoid of police intimidation or perception).

185 *See Miranda*, 384 U.S. at 436, 461, 478 (outlining evidentiary rule designed to exclude unwarned statements made under compulsion); *see also* United States v. Patane, 124 S. Ct. 2620, 2626 (2004) (explaining that *Miranda* rule is prophylactic and is utilized to prevent violations of Self-Incrimination Clause). *See generally* United States v. Faulkingham, 295 F.3d 85 (2002) (describing *how Miranda's* evidentiary rule is applied in practice).

186 *See Miranda*, 384 U.S. at 436, 461, 478 (asserting that *Miranda* rule applies only to unwarned statements); *see also Patane*, 124 S. Ct. at 2627 (stating that *Miranda* rule creates presumption of coercion in absence of particular warnings). *See generally* Dickerson v. United States, 530 U.S. 428 (2000) (discussing proper application of *Miranda* rule to unwarned statements).

187 *See Faulkingham*, 295 F.3d at 94 (stating that negligence of agents to administer *Miranda* warnings resulted in suppression of confession); *see also* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (discussing significance of unwarned statements and their admissibility); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (asserting that Fifth Amendment prevents use of non-*Mirandized* statements).

188 *See Faulkingham*, 295 F.3d at 91 (asserting three categories of evidence that may be considered derivative fruits of un-*Mirandized* confession: physical evidence, statements made by someone other than unwarned defendant, and future statements made by defendant after initial unwarned statement); *see also Patane*, 124 S. Ct. at 2629 (stating that because of difference between unwarned statements and unreasonable searches under Fourth Amendment, there is no reason to apply "fruit of the poisonous tree" doctrine for *Miranda* violations). *See generally Sterling*, 283 F.3d 216 (discussing way in which physical evidence may be admissible despite fact that defendant made unwarned statements which were inadmissible).

189 *See* Withrow v. Williams, 507 U.S. 680, 690 (1993) (stating that unless prosecution can show that the warnings and waiver were made as threshold matter, it

excluding voluntary and reliable unwarned statements are weighty.[190] The Court has determined that, in order to protect Fifth Amendment rights, the cost of excluding some reliable and otherwise admissible evidence is outweighed by the interest in protecting against admission of a compelled confession against a defendant.[191] Thus, "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy."[192] Accordingly, there is no sufficient justification for excluding physical evidence that the police discover as a result of an unwarned statement.[193] The consequent costs to the truth seeking function of trials caused by the suppression of reliable physical evidence is not and cannot be balanced by any countervailing policy justifications.[194]

In *Patane*, the government sought to introduce at trial the firearm whose location the defendant provided to police.[195] The unwarned statement would, of course, not be used in the course

cannot overcome objections to the use of such statements obtained from a suspect during custodial interrogation at trial); *see also* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (explaining that confessions obtained through custodial interrogation after illegal arrest must be excluded unless an exception applies); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (asserting that balance exists between society's interest in prosecuting criminals and protection afforded to defendant's by pre-*Miranda* standards); Harris v. New York, 401 U.S. 225, 226 (1971) (discussing how defendant's voluntary statements made under oath interact with traditional rules of perjury).

190 *See* United States v. Dickerson, 530 U.S. 428, 444 (2000) (noting many voluntary statements will be excluded); *Withrow*, 507 U.S. at 690 (acknowledging that some statements not traditionally deemed involuntary may be excluded); *see also Elstad*, 470 U.S. at 306 (comparing Fourth and Fifth Amendments); *cf. Tucker*, 417 U.S. at 450 (considering strong interest in making relevant information available to trier of fact); *Harris*, 401 U.S. at 225–26 (mentioning truth-testing devices used by adversarial system).

191 *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized"); *see also Tucker*, 417 U.S. at 450 (balancing interest of constitutionally protected rights with making relevant information available to trier of fact); *c.f. Harris*, 401 U.S. at 225–26 (allowing statement taken in violation of *Miranda* to be used for impeachment purposes).

192 Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part).

193 *See e.g.*, United States v. Faulkingham, 295 F.3d 85, 94 (2002) (allowing derivative evidence to be used); *see also* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (holding that district court was correct denying suppression of physical evidence); *c.f.* United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (stating that suppressing physical evidence was "inconsistent with deterring improper police conduct and the goal of assuring trustworthy evidence").

194 *See Faulkingham*, 295 F.3d at 93-94 (noting derivative evidence as reliable); *see also Sterling*, 283 F.3d at 219 (allowing shotgun into evidence); *DeSumma*, 272 F.3d at 180 (stating "fruit of the poisonous tree" does not apply to derivative evidence).

195 United States v. Patane, 304 F.3d 1013, 1014-15 (10th Cir. 2002) (suppressing gun as physical fruit of *Miranda* violation), *rev'd*, 124 S. Ct. 2620 (2004).

of the government's direct case.[196] Therefore, the possible infringement of the defendant's Fifth Amendment right not to have any compelled statements admitted in evidence against him would not be implicated.[197] To suppress the firearm as well would impose an insurmountable impediment to the government's ability to prosecute criminal defendants.[198] An otherwise effective grant of immunity from prosecution is a disproportionate cost for society to bear because the police failed to provide complete warnings to a suspect before asking him questions.[199]

C. No Policy Justifications Serve to Validate the Suppression of Physical Evidence Derived from an Unwarned Statement

Significantly, until the plurality decision in *Patane*, it was not clear whether physical evidence derived from statements acquired in violation of *Miranda* must be excluded from the government's case-in-chief.[200] Yet, assuming *arguendo* that a derivative physical evidence exclusionary rule is applicable where there is a showing of actual police coercion or violent procedures,[201] the rationalization and justification for such an

196 *Id.* at 1018-19 (noting government's concession that statements made were inadmissible under *Miranda*).

197 *See Faulkingham*, 295 F.3d at 92 (discussing *Elstad* decision and its opinion that Fifth Amendment is not concerned with non-testimonial evidence); *see also Sterling*, 283 F.3d at 219 (stating "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"); *c.f. DeSumma*, 272 F.3d at 180 (mentioning policy reasons for allowing physical evidence).

198 *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (comparing Fourth and Fifth Amendment protections); *c.f.* Michigan v. Tucker, 417 U.S. 433, 450 (1974) (asserting that "we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce"). *See generally* Withrow v. Williams, 507 U.S. 680, 690 (1993) (discussing prosecutors burden of proof).

199 *See Elstad*, 470 U.S. at 306 (noting that fruits need not be discarded as inherently tainted); *see also Tucker*, 417 U.S. at 450 (discussing society's interest in effective prosecution of criminals); George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1995 n.183 (2004) (analyzing effect *Miranda* has had on prosecutors).

200 *See* United States v. Patane, 124 S. Ct. 2620, 2626–30 (2004) (allowing physical derivative evidence to be used); *see also* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (stating that unless *Miranda* warnings are given, no evidence obtained from interrogation can be used against defendant); *c.f.* United States v. Sterling, 283 F.3d 216, 218–19 (4th Cir. 2002) (holding that Fifth Amendment rights are not violated by admitting derivative physical evidence).

201 *See* New York v. Quarles, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in part and dissenting in part) (stating "when the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of a broader exclusionary rule is warranted."); *see also Sterling*, 283

exclusionary rule is inapplicable absent actual compulsion. The Fifth Amendment is not intrinsically concerned with physical evidence, and judicial extensions of the Fifth Amendment must be developed with greater moderation where physical evidence, which does not have a testimonial component, is sought to be excluded.[202] Moreover, the policy of deterrence is inapplicable within this context because there does not exist a constitutional prohibition against interrogation absent the administration of *Miranda* warnings.[203] Furthermore, the current exclusionary rule does afford a deterrent by mandating the suppression of the unwarned statement.[204] Additionally, the unreliability concerns that stem from statements acquired through actual coercion are irrelevant where the statements are not admitted in the government's case-in-chief and actual coercion has not been demonstrated.[205] Simply put, the unreliability of a statement does not affect physical evidence. As the Court noted in *Patane*, "unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter."[206]

F.3d at 218 (noting decision in *Elstad*, which held "a voluntary statement given after *Miranda* warnings is admissible, notwithstanding prior unwarned statements, so long as both statements were not coerced"); *c.f.* United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (noting *voluntary* and *uncoerced* evidence is admissible).

202 *See DeSumma*, 272 F.3d at 170 (noting that Fifth Amendment prevents use of compelled *statements*); *see also Miranda*, 384 U.S. at 444 (stating that prosecution may not use statements obtained through custodial interrogation, absent procedural safeguards). *See generally Sterling*, 283 F.3d at 219 (proposing derivative evidence obtained from voluntary, unwarned statement is never "fruit of the poisonous tree").

203 *See Miranda*, 384 U.S. at 479 (noting that no evidence resulting from interrogation may be used against defendant); *see also* Harris v. New York, 401 U.S. 222, 223–26 (1971) (discussing *Miranda* and how it only bars introduction of testimonial evidence at trial seized absent *Miranda* warnings); *c.f.* Michigan v. Tucker, 417 U.S. 433, 439 (1974) (noting Fifth Amendment clause as reading "[n]o person . . . shall be compelled in any criminal case to be a witness against himself").

204 *See Miranda*, 384 U.S. at 478–79 (holding that statements obtained in violation of *Miranda* must be suppressed); *see also Tucker*, 417 U.S. at 450 (noting that unwarned statement had already been excised). *See generally Harris*, 401 U.S. at 225–26 (allowing statements to be used for impeachment).

205 *See Miranda*, 384 U.S. at 478 (noting that statements given freely without coercion are generally admissible); *see also DeSumma*, 272 F.3d at 180 (asserting that "[t]he element of police misconduct is not a factor that comes into play when the prosecution uses a voluntary statement"); *c.f.* Kastigar v. United States, 406 U.S. 441, 460 (1972) (noting inadmissibility of coerced confessions).

206 United States v. Patane, 124 S. Ct. 2620, 2629 (2004). The Court in *Patane* also refused to apply the balancing test of Nardone v. United States, 308 U.S. 338 (1939), because *Patane* did not involve a violation of either a statute or the Constitution. *Patane*, 124 S. Ct. 2620, at 2629 n.4.

1. The Fifth Amendment Is Not Textually Concerned with Physical Evidence

In assessing whether courts should suppress physical evidence derived from a failure to give *Miranda* warnings, it must be acknowledged that the Fifth Amendment itself is not directly concerned with physical evidence.[207] The Self-Incrimination Clause deals exclusively with testimony; it does not, however, prohibit the provision of non-testimonial evidentiary materials.[208] That principle was articulated in *Schmerber v. California*,[209] which was decided shortly after the *Miranda* decision. In *Schmerber*, the Court held that the extraction of blood from a defendant and the use of its analysis at trial did not offend the Self-Incrimination Clause of the Fifth Amendment.[210] The Court held that "the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature,"[211] and that "the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to those ends."[212] The Court indicated that "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege

207 *See* United States v. Hubbell, 530 U.S. 27, 34–35 (2000) (discussing text of Fifth Amendment); *see also DeSumma*, 272 F.3d at 180 (noting that Fifth Amendment prevents use of statements, not physical evidence). *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (analyzing judicial history of Fifth Amendment).

208 *See* Schmerber v. California, 384 U.S. 757, 763–64 (1966) (discussing privilege extending to an accused's communications but not to compelled fingerprinting, photographing, measurements, writings or speaking for identification, appearing in court, standing, or making a particular gesture); *see also* Gabrielle Porter Dennison, *Self-Incrimination: A Comparative Analysis of the Federal and Connecticut Constitutional Provisions*, 14 QUINNIPIAC L. REV. 745, 747-48 (1994) (stating provision against self-incrimination did not reach physical evidence, such as "hairs, fibers, handwriting, and blood samples" that were taken from defendant); Ryan McLennan, *Supreme Court Review: Does Immunity Granted Really Equal Immunity Received?*, 91 J. CRIM. L. & CRIMINOLOGY 469, 472 (2001) (commenting that *Schmerber* Court narrowed the reach of Self-Incrimination Clause by permitting compelled production of blood).

209 384 U.S. 757 (1966).

210 *Schmerber*, 384 U.S. at 765 (holding blood test was not protected by Self-Incrimination Clause because it was neither defendant's testimony nor evidence of communicative act by defendant).

211 *Id.* at 761.

212 *Id.*

grounds."[213] *Schmerber* thus establishes that the Self-Incrimination Clause does not bar the admission of non-testimonial evidence compelled from an individual.[214] For example, an individual may be compelled to provide a blood sample, as in *Schmerber*,[215] a voice exemplar,[216] or a handwriting sample.[217] Similarly, an individual may be required to participate in a lineup,[218] or to try on clothing in court.[219]

However, *Patane* raises an issue that is quite different from the *Schmerber* line of reasoning because the defendant made testimonial communications that led the police to the incriminating evidence.[220] Seemingly, *Patane* conceptually falls between the distinct extremes of *Schmerber* and the effects of the traditional exclusionary rule. As Judge Friendly noted, the use

213 *Id.* at 765.

214 Schmerber v. California, 384 U.S. 757, 765 (1966) (concluding defendant's testimony or evidence relating to communication by defendant are the only types of evidence protected by Self-Incrimination Clause); *see* Dennison, *supra* note 208, at 747-48 (highlighting particular types of physical evidence not protected by Self-Incrimination Clause); *see also* McLennan, *supra* note 208, at 472 (noting *Schmerber* decision permitted compelled blood production as evidence).

215 *See Schmerber*, 384 U.S. at 765 (holding compelled blood sample admissible into evidence); *see also* Dennison, *supra* note 208, at 747-48 (discussing narrowing of Self-Incrimination Clause in 1960's to include blood samples); McLennan, *supra* note 208, at 472 (highlighting admissibility of compelled blood samples into evidence).

216 *See* United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (holding "compelled production of the voice exemplars would [not] violate the Fifth Amendment"); *see also* Charles Gardner Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611, 612 (1987) (discussing compulsion by government to have defendant speak certain words or phrases); McLennan, *supra* note 208, at 472 (noting Self-Incrimination Clause does not extend to voice exemplars).

217 *See* Gilbert v. California, 388 U.S. 263, 266-67 (1967) (holding handwriting samples did not violate any constitutional rights); *see also* Geyh, *supra* note 216, at 612 (stating that Court permitted handwriting samples into evidence although they were compelled by government); McLennan, *supra* note 208, at 472 (noting Self-Incrimination Clause does not extend to handwriting samples).

218 *See* United States v. Wade, 388 U.S. 218, 222-23 (1967) (holding government compulsion of defendant participating in a lineup does not violate Self-Incrimination Clause); *see also* Geyh, *supra* note 216, at 612 (noting defendants have been forced to participate in line-ups); *see* McLennan, *supra* note 208, at 472 (noting that *Wade* Court narrowed scope of Fifth Amendment based on testimonial aspects of the evidence).

219 *See* Holt v. United States, 218 U.S. 245, 252-53 (1910) (holding no Fifth Amendment violation if defendant tries clothing on in court); *see also* Dennison, *supra* note 208, at 750-53 (discussing non-testimonial evidence that is also not communicative in nature was admitted into evidence by Court); McLennan, *supra* note 208, at 472 (noting Supreme Court focused on testimonial aspects of evidence when deciding whether it was protected by Self-Incrimination Clause).

220 United States v. Patane, 304 F.3d 1013, 1015-16 (10th Cir. 2002) (discussing information Patane gave police after officers failed to administer *Miranda* warnings); *see* Ambach, *supra* note 112, at 777-78 (noting defendant made statement that lead to discovery of physical evidence); *see also* Leading Case, supra note 146, at 298-99 (noting Self-Incrimination Clause protects compelled statements and will not extend to non-testimonial evidence voluntarily given by defendant).

of a non-coerced but unwarned statement to locate physical evidence "differs only by a shade from the permitted use for that purpose of his body or his blood."[221] Thus:

> Since the case lies between what the state clearly may compel and what it clearly may not, a strong analytical argument can be made for an intermediate rule whereby although it cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the *Miranda* code could still be used.[222]

This tenet quite properly resolves the seeming tension inherent in the Fifth Amendment by excluding the unwarned statement but allowing the admission of its non-testimonial "fruits," absent actual coercion.[223]

Some courts and commentators have posited the suggestion that the non-application of the "fruit of the poisonous tree" doctrine would inevitably encourage the police to engage in unwarned interrogations in order to acquire derivative evidence.[224] However, courts do not "sit as a kind of super-Citizens' Police Review Board, creating some set of federal common-law police regulations for local law enforcement officers . . . by distinguishing, on a case-by-case basis, 'good' police conduct from 'bad.'"[225] Instead, the appropriate function of the judiciary in this circumstance is to "determine whether police conduct has in some way rendered the admission of evidence at a criminal trial violative of a defendant's constitutional rights."[226]

221 HENRY J. FRIENDLY, BENCHMARKS 280 (1967).

222 *Id.*

223 *See* United States v. Patane, 124 S. Ct. 2620, 2628–30 (2004) (holding that exclusion of unwarned statement is a complete remedy to *Miranda* violations and "fruit of the poisonous tree" doctrine does not apply); *see also* Whitebread, *supra* note 148, at 123–25 (discussing *Patane* and its holding that would exclude non-testimonial fruits of *Miranda* violation); G. Paul McCormick, *Supreme Court 2003-2004 Review – Part I*, 28 CHAMPION 12, 16-17 (2004) (highlighting physical evidence seized due to *Miranda* violation should be admitted into evidence).

224 *See* United States v. Orso, 275 F.3d 1190, 1194–95 (9th Cir. 2001) (Trott, J., dissenting) (stating *Orso* decision implies that police can violate the Constitution and still have fruits of that violation admitted into evidence); *see also* Commonwealth v. Martin, 2004 Mass. Super. LEXIS 433, at *5-6 (Mass. Super. Ct. Sept. 27 2004) (finding *Patane* holding "troubling" and noting that it provides inducement to violate *Miranda*); McCormick, *supra* note 223, at 17 (quoting Justice Souter who suggested that *Patane* decision will give police incentive to ignore *Miranda*).

225 *Orso*, 275 F.3d at 1191 (O'Scannlain, J., concurring).

226 *Id.*

Therefore, what might be thought improper is not necessarily prohibited by the Constitution.[227] And indeed, the proper remedy for a failure to administer *Miranda* warnings, as noted above, is the suppression of the unwarned statement.[228]

2. Deterrence Principles Do Not Mandate the Exclusion of Derivative Physical Evidence

The Court has considered, in a number of cases, whether the need to deter improper conduct necessitated the extension of *Miranda*'s exclusionary rule to derivative physical evidence.[229] Despite the fact that the court rejected the extension of the *Miranda* exclusionary rule on the basis of a deterrence rationale,[230] the Tenth Circuit primarily relied on a deterrence rationale to justify an expansive reading of the "fruit of the poisonous tree" doctrine that allows for the suppression of physical evidence derived from unwarned statements.[231] Yet, deterrence offers no rationalization for suppression of the physical evidence obtained in the *Patane* case.[232]

In *Wong Sun*, the Court indicated that evidence that is the "fruit" of an illegal search or seizure under the Fourth

227 *See id.* (noting that not everything that is improper is unconstitutional). *But see Orso*, 275 F.3d 1194–96 (Trott, J., dissenting) (noting that majority decision reduces police incentive to follow *Miranda*). *See generally Patane*, 124 S. Ct. 2620, 2629 n.3 (noting that although some courts have suggested that *Miranda* is a constraint on police, *Miranda's* decision states that it deals only with admissibility of evidence).

228 *See Patane*, 124 S. Ct. at 2629 (providing that exclusion is remedy for *Miranda* violation); *see also* Chavez v. Martinez, 538 U.S. 760, 789–90 (2003) (Kennedy, J., concurring in part and dissenting in part) (stating "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy). *See generally* Withrow v. Williams, Jr., 507 U.S. 680, 703 (1993) (noting exclusion of unwarned statements encourages police to institute procedural safeguards).

229 *See* Nix v. Williams, 467 U.S. 431, 442–43 (1984) (noting core rationale for excluding derivative evidence is to deter police from improper conduct); *cf.* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (dealing with testimonial evidence); Oregon v. Hass, 420 U.S. 714, 723–24 (1975) (holding defendants statements taken in violation of *Miranda* could be used to impeach him at trial); Michigan v. Tucker, 417 U.S. 443, 447–48 (1974) (discussing deterrent effect of *Miranda* and testimonial evidence); Harris v. New York, 401 U.S. 222, 225 (1971) (allowing evidence to be used for impeachment purposes).

230 *See* cases cited *supra* note 229.

231 *See* United States v. Patane, 304 F.3d 1013, 1028–29 (10th Cir. 2002) (relying on deterrence theory); *see also* Ambach, *supra* note 112, at 778–79 (stating that Tenth Circuit decision relied on deterrence theory); Leading Case, supra note 146, at 298 (writing that Tenth Circuit did not wanting to eviscerate any deterrent effect).

232 *See* Angarella & Rutledge, *supra* note 137, at 180–81 (summarizing *Patane* decision and stating that it does not support Tenth Circuit's reliance on deterrence theory). *See generally* Thomas III, supra note 199, at 1995 n.183 (stating that five justices agreed that physical evidence *is* admissible in *Patane*); Hartman, *supra* note 62, at 284–85 (noting prophylactic nature of *Patane* decision).

Amendment must be suppressed.[233] In *Elstad*, the Court refused to utilize the "fruit of the poisonous tree" doctrine to bar the admission of evidence that was the "fruit" of a *Miranda* violation.[234] Moreover, the Court indicated that there is a significant distinction between a coerced confession and a statement in which "the breach of the *Miranda* procedures . . . involved no actual compulsion."[235] Thus, a *Miranda* violation does not itself offend the Fifth Amendment prohibition barring the use of "compelled" testimony.[236] In contrast, the Tenth Circuit indicated that *Elstad* "drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully *Mirandized*," which need not be suppressed, and "fruits consisting of subsequently obtained 'inanimate evidentiary objects,'" which the Tenth Circuit determined must be suppressed, only to have this determination reversed by the plurality decision in *Patane*.[237] And while *Elstad* was concerned with the possible suppression of a voluntary, warned statement subsequent to a *Miranda* violation, *Elstad*'s rationale is not limited to only its facts.[238]

In fact, *Elstad* roundly rejected the notion that the *Wong Sun* doctrine applies to the "fruits" of a statement obtained without *Miranda* warnings.[239] After noting *Tucker*'s refusal to apply the

233 Wong Sun v. United States, 371 U.S. 471, 484–85 (1963) (stating "this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search").

234 *Elstad*, 470 U.S. at 304–09, 317–18 (asserting that "[n]o further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver").

235 Oregon v. Elstad, 470 U.S. 298, 308 (1995).

236 *Id.* at 306–07 n.1 (noting Justice Stevens' puzzlement at the expressed statement); *see* Judy Olivero, *The Second Circuit Review – 1985-1986 Term: Criminal Procedure: The Second Circuit Undermines the Privilege Against Self-Incrimination:* United States v. Morales, 53 BROOK. L. REV. 443, 456 (1987) (stating that mere *Miranda* violation does not necessarily indicate Fifth Amendment violation); Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU L. REV. 185, 267 (2000) (writing that unwarned statement does not violate Fifth Amendment).

237 United States v. Patane, 304 F.3d 1013, 1021 (10th Cir. 2002), *rev'd*, 124 S. Ct. 2620 (2004).

238 *See Elstad*, 470 U.S. at 306–07 n.1 (noting that courts in *Quarles* and *Tucker* held similarly); *see also* Ambach, supra note 112, at 776 (writing that *Elstad* language could be broadly applied); William T. Pizzi, *Criminal Law: The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 579 n.91 (1985) (stating that *Elstad* opinion is broadly worded and permits broad reading).

239 *Elstad*, 470 U.S. at 308–18 (holding traditional Fourth Amendment "fruits" doctrine does not apply to *Miranda* violations); *see* Dickerson v. United States, 530 U.S. 428, 441 (2000) (noting decision in *Elstad* refused to apply to traditional "fruits" doctrine to *Miranda* violations); Donald Dripps, Miranda *Caselaw Really Inconsistent? A Proposed*

"fruit of the poisonous tree" doctrine, the *Elstad* Court indicated that *Tucker*'s rationale applies "with equal force when the alleged 'fruit' of a non-coercive *Miranda* violation" is "a witness," "an article of evidence," or "the accused's own voluntary testimony."[240] Moreover, *Elstad* explained that suppression was unnecessary in all three contexts.[241] Indeed, it is not surprising that the Court in *Dickerson* read *Elstad* as broadly "refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases,"[242] because of *Elstad*'s recognition that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[243] A Fourth Amendment violation occurs when the search occurs and "use of fruits of a past unlawful search or seizure [works] no new Fourth Amendment wrong."[244] The "fruit of the poisonous tree" doctrine operates to deter these violations at the extraordinary cost of barring the use of reliable evidence at trial.[245] However, and significantly, the Court has noted the distinct purposes of both the Fourth Amendment and the *Miranda* exclusionary rules.[246] The police do not violate the Fifth Amendment when they take an unwarned statement during a custodial interrogation.[247] Rather, the Fifth Amendment requires

Fifth Amendment Synthesis, 17 CONST. COMMENTARY 19, 40–42 (2000) (stating *Elstad* "rejects the analogy to Fourth Amendment fruits analysis in the context of successive admissions").

240 *Elstad*, 470 U.S. at 308.

241 United States v. Elstad, 470 U.S. 298, 308–18 (1995) (stating "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary").

242 *Dickerson*, 530 U.S. at 441.

243 *Id.*

244 United States v. Leon, 468 U.S. 897, 906 (1984) (internal quotation marks omitted).

245 *See* United States v. Calandra, 414 U.S. 338, 348 (1974) (discussing balancing approach in Fourth Amendment exclusionary cases); *see also* Stone v. Powell, 428 U.S. 465, 486 (1976) (noting primary justification for exclusionary rule is deterrence of unlawful police conduct); United States v. Janis, 428 U.S. 433, 446 (1976) (stating that rule is only extended "to those areas where its remedial objectives are thought most efficaciously served").

246 *See* Withrow v. Williams, 507 U.S. 680, 691 (1993) (elucidating intent behind *Miranda* and Fourth Amendment exclusionary rules); *Leon*, 468 U.S. at 906 (1984) (stating that "[t]he rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved'"); *Stone*, 428 U.S. at 482 (noting that reason for creating Fourth Amendment was to cure evil associated with general warrants and to protect sanctity of the person and home).

247 *See* Chavez v. Martinez, 538 U.S. 760, 766–69 (2003) (Kennedy, J., concurring in part and dissenting in part) (declaring that constitutional rights are not violated when

only that the defendant be afforded the right at trial to exclude the use of the unwarned statement from the government's case-in-chief.[248] Yet, *Miranda* does contain language that professes to create general rules for the conduct of the police.[249] And some of the Court's subsequent cases include analogous descriptions of *Miranda* procedures and note that an appraisal, of whether distinct and particular applications of the *Miranda* exclusionary rule would deter departures from those procedures, might be appropriate.[250] However, the Court's formulation and understanding of *Miranda* has developed and the underlying purpose of the rule is clearly to protect against the possibility that courts will admit a coerced confession, not to regulate police conduct.[251]

Therefore, as noted above, deterrence is not an underlying purpose of the *Miranda* exclusionary rule and the police do not engage in unconstitutional conduct by questioning a suspect without the benefits of *Miranda* warnings.[252] Even if the

statements are taken in violation of *Miranda*); United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (asserting that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial"); Kastigar v. United States, 406 U.S. 441, 453 (1972) (discussing how protection from the use of improperly acquired information is only protection required to prevent constitutional wrongs).

248 *See Chavez*, 538 U.S. at 766–69 (noting that taking of a statement does not violate constitutional guarantees); *Withrow*, 507 U.S. at 692 (describing Fifth Amendment as a 'trial right'). *See generally* Michigan v. Tucker, 417 U.S. 433, 448–49 (1974) (explaining harm to judicial system that would occur if self incriminating statements were not excluded from trial).

249 *See* Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) (discussing warnings police are required to make prior to eliciting information from an arrestee). *See generally* Yale Kamisar, *Willard Pedrick Lecture:* Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 388 n.6 (2001) (detailing situation that would occur if police officers were not bound to warn of *Miranda* rights); Martin H. Sitler, *The Armor: Recent Developments in Self-Incrimination Law,* 2000 ARMY LAW. 47, 48 (2000) (explicating warnings police must give suspects upon arrest).

250 *See* Moran v. Burbine, 475 U.S. 412, 420 (1986) (explaining impositions of *Miranda*); *Michigan*, 417 U.S. at 448 (clarifying evidentiary downfall of acquiring statements in violation of *Miranda*). *See generally* Dickerson v. United States, 530 U.S. 428, 434–43 (2000) (describing *Miranda* procedures in detail).

251 *See Dickerson*, 530 U.S. at 442–44 (explicating widespread acceptance of *Miranda* as device to protect arrestee's rights to silence); Minnick v. Mississippi, 498 U.S. 146, 152 (1990) (noting that abiding by rules set forth in *Miranda* would provide an adequate protective device against Fifth Amendment violations); *see also Chavez*, 538 U.S. at 766–69 (noting *Miranda* prevents admission of evidence at trial taken in violation of *Miranda* but does not prevent the actual taking).

252 *See Chavez*, 538 U.S. at 766–69 (defining the word 'case' as used in Fifth Amendment); *Verdugo-Urquidez*, 494 U.S. at 264 (stating "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial"); *Kastigar*, 406 U.S. at 453 (discussing how protection from

deterrence of police failures to give *Miranda* warnings were the basis of the *Miranda* exclusionary rule, this rule cannot properly be extended to exclude derivative evidence.[253] Suppression of the unwarned statement itself in the government's case-in-chief is a more than sufficient deterrent.[254] *Patane* demonstrates why a greater deterrent response is inappropriate. The officer in *Patane* began to give the defendant *Miranda* warnings, and was interrupted by the defendant's assertion that he knew his rights.[255] It is extraordinarily challenging to characterize the officer's decision not to complete the *Miranda* warnings as such blameworthy conduct as to mandate and indeed to justify the suppression not only of the unwarned statements but also the firearm that was found.[256] And where, as in *Patane*, the failure to administer *Miranda* warnings was not an intentional interrogation tactic to obtain incriminating evidence, a deterrence rationale is particularly unconvincing.[257] However, the Tenth Circuit indicated "the inability to offer [defendant's]

use of improperly acquired information is the only thing required to forego constitutional wrongs).

253 *See* Oregon v. Elstad, 470 U.S. 298, 319 n.2 (1985) (Brennan, J., dissenting) (stating that dicta of *Miranda* should not be read as to foreclose use of derivative evidence); Bateman, *supra* note 171, at 219 (noting Supreme Court's view that derivative evidence is admissible). *See generally* David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 860 (1992) (articulating connection to testimonial or communicative acts evidence must have in order to be excluded under Fifth Amendment).

254 *See* Patrick Alexander, Note, Pennsylvania Board of Probation & Parole v. Scott*: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup*, 31 LOY. U. CHI. L.J. 69, 91 (1999) (observing Court's opinion that possibility of suppression at trial sufficiently deters police and parole officers); David J. Lekich, *Survey of Developments in North Carolina Law and the Fourth Circuit, 1996: III. Criminal Law: Broken Police Promises: Balancing the Due Process Clause Against the State's Right to Prosecute*, 75 N.C. L. REV. 2346, 2380 n.216 (1997) (discussing deterrent effects of suppression). *See generally* North Carolina v. Sturgill, 469 S.E.2d 557, 568–69 (N.C. Ct. App. 1996) (canvassing how suppression adequately deters and how there is, likewise, no need to dismiss the case in entirety).

255 *See* United States v. Patane, 304 F.3d 1013, 1015 (10th Cir. 2002) (stating Patane stopped the officer in mid recitation of *Miranda* rights), *rev'd*, 124 S. Ct. 2620 (2004).

256 *See Patane*, 304 F.3d at 1029 (holding that gun seized due to *Miranda* violation was inadmissible). *See generally* United States v. Hubbell, 530 U.S. 27, 34–35 (2000) (discussing bounds of Fifth Amendment protection with regard to exclusions of evidence); Pennsylvania v. Muniz, 496 U.S. 582, 594 (1990) (addressing type of evidence excluded by Fifth Amendment).

257 *See Patane*, 304 F.3d at 1015 (stating that police officer stopped in the middle of *Miranda* rights at accused's request); *see also* Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule – A Critique*, 35 HASTINGS L.J. 429, 430–1 (1984) (discussing 'good faith' exception to Fifth Amendment violations); *cf.* Robertson, *supra* note 160, at 49 (explaining how there could be deterrent advantages to suppression of evidence for negligent failures to warn).

statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction."[258] Yet, as the plurality indicated, the Tenth Circuit was in error.[259]

Physical evidence derived from unwarned statements must still be connected to a defendant to have any significant evidentiary value[260] and because such a connection may be difficult or indeed impossible to establish absent a defendant's statement, the suppression of an unwarned statement could potentially bar prosecution in many cases despite the admissibility of the derivative physical evidence.[261] For example, suppression of a defendant's unwarned statement that indicates ownership or the location of incriminating evidence may bar prosecution in the not uncommon situation where the evidence is found in a location to which others also have ready access. Similarly, the suppression of a defendant's unwarned confession to a murder that led to the location of the victim's body could quite easily render a prosecution for murder impracticable, despite the admissibility of the victim's body.[262] Thus, the police

258 *Patane*, 304 F.3d, at 1026.

259 *See Patane*, 304 F.3d at 2629–30 (stating there is nothing to deter on behalf of police for failure to warn via *Miranda*); *see also* Leading Case, *supra* note 146, at 298–300 (explaining Tenth Circuit's decision in *Patane*). *See generally* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (noting lack of deterrence resulting from exclusion when police act in good faith).

260 *See generally* New York v. Quarles, 467 U.S. 649 (1984) (discussing problems inherent in connecting person to prior statement); Harris v. New York, 401 U.S. 222 (1971) (evidencing use of inadmissible statements to impeach defendant); Wollin, *supra* note 253 (articulating connection to testimonial or communicative acts evidence must have in order to be excluded under Fifth Amendment).

261 *Cf.* Suzanne Darrow-Kleinhaus, *The Talmudic Rule Against Self-Incrimination and the American Exclusionary Rule: A Societal Prohibitions Versus and Affirmative Individual Right*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 205, 222 (2002) (noting that court has been willing to allow prosecutors at trial to use statements acquired in violation of *Miranda* to impeach defendant). *See generally* Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 550–56 (1999) (enumerating probative and reliable value of derivative evidence and counterintuitive nature of its exclusion); Thomas III., *supra* note 199 (discussing various instances where *Miranda* challenges were made, and percentage of cases where evidence was admitted or suppressed).

262 *See* Commonwealth v. Leaming, 247 A.2d 590, 593–94 (Pa. 1968) (finding that evidence leading to victim's remains was inadmissible since obtained from unwarned confession); *cf.* State v. Garrison, 519 P.2d 1295, 1302 (Or. Ct. App. 1974) (reversing conviction of murder because video and audio recordings providing location of victim's body were made after defendant's request for appointed attorney was denied). *But see* Nix v. Williams, 467 U.S. 431, 449–50 (1984) (allowing admittance of incriminating statements by defendant because victim's body would have inevitably been discovered notwithstanding defendant's confession).

have a significant motivation to preserve the admissibility of a defendant's statement and, therefore, to issue *Miranda* warnings.[263] The Tenth Circuit significantly underestimated the deterrent effect of suppressing a defendant's unwarned statement.[264]

3. Excluding Physical Evidence Does Not Aid the Reliability Concerns of the Fifth Amendment

The suppression of physical evidence derived from unwarned statements does not effectuate the rationale linked to the Fifth Amendment's concern with reliability. The privilege against compelled self-incrimination is founded, in part, on the understanding that "coerced confessions are inherently untrustworthy."[265] Also, while coerced confessions are suppressed regardless of a subsequent determination of truth,[266] "it also seems clear that coerced statements have been regarded with some mistrust" and there is a significant apprehension that the "severe pressures" produced by particular interrogation practices "may override a particular suspect's insistence on innocence" and lead a defendant "to accuse himself falsely."[267] However, by suppressing a significant group of statements in which "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," the *Miranda* exclusionary rule thus "guard[s] against 'the use of

263 *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966) (asserting that warnings required are "prerequisites to the admissibility of any statement made by a defendant"); *see, e.g.*, *Leaming*, 247 A.2d at 595 (noting that an individual cannot waive right of which he is unaware). *But cf. Nix*, 467 U.S. at 446–47 (finding that when an officer appeals to defendant's decency to reveal location of victim's body absent counsel, suppression of such evidence would burden the administration of criminal justice).

264 *See* United States v. Patane, 124 S. Ct. 2620, 2629–30 (2004) (noting that Tenth Circuit's position leads to strong deterrence-based argument for suppression of fruits); *cf. Nix*, 467 U.S. at 442–43 (noting that Court has justified expansion of exclusionary rule to deter police from constitutional violations). *See generally* United States v. Faulkingham, 295 F.3d 85, 90 (1st Cir. 2002) (noting that trustworthiness and deterrence are rationales behind *Miranda*).

265 Dickerson v. United States, 530 U.S. 428, 433 (2000).

266 *See* Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (asserting that confessions that are product of physical or psychological coercion are inadmissible); *see also* La France v. Bohlinger, III., 499 F.2d 29, 32–33 (1st Cir. 1974) (recognizing that evidence induced by coercion is unacceptable regardless of its truth or untruth); Jackson v. Denno, 378 U.S. 368, 377 (1964) (noting that defendant is deprived of due process if he is convicted based upon an involuntary confession, regardless of its truth).

267 Michigan v. Tucker, 417 U.S. 433, 444–49, n.23 (1970).

unreliable statements at trial.'"[268] Yet, where, as is the case in *Patane*, physical evidence is at issue, the concern regarding reliability has little to no substance.[269] Generally, physical evidence, such as the firearm seized in *Patane*, is undoubtedly "reliable" and "trustworthy" evidence.[270]

> There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtless this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied.[271]

Consequently, the admissibility of such physical evidence at trial does not implicate the Fifth Amendment's concern to protect the truth-seeking process, while suppression of that physical evidence would plainly undermine the search for the truth.[272]

268 *Dickerson*, 530 U.S. at 435; *see* Withrow v. Williams, 507 U.S. 680, 692 (1993) (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966)); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973) (noting that *Miranda*'s decision was based upon need to protect fairness of trial).

269 *See* United States v. Villalba-Alvarado, 345 F.3d 1007, 1018 (8th Cir. 2003) (suggesting that Tenth Circuit's decision in *Patane* is contrary to court's understanding of inherent reliability of physical evidence); *see also Faulkingham*, 295 F.3d at 93 (finding derivative physical evidence reliable). *See generally* Schonwald, *supra* note 7, at 1197 (noting that *Villalba-Alvarado*'s decision concludes that reliability of physical evidence is not diminished by an unwarned statement).

270 *See* United States v. Leon, 468 U.S. 897, 907 (1984) (noting tangible evidence as "inherently trustworthy"); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) (stating that "physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant"); *Tucker*, 417 U.S. at 458 (Brennan, J., concurring) (suggesting that element of unreliability is less important when admissibility of "fruits" is at issue).

271 FRIENDLY, *supra* note 221, at 282; *see* New York v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part and dissenting in part) (suggesting that "[t]he learning of these countries was important to the development of the initial *Miranda* rule. It therefore should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today"); *see also* Miranda v. Arizona, 384 U.S. 436, 486–89 (1966) (examining foreign countries in an effort to develop code to regulate custodial interrogatories).

272 *See* United States v. Faulkingham, 295 F.3d 85, 93 (1st Cir. 2002) (stating that Fifth Amendment "balances the value of the derivative evidence to the truth seeking process against the protection of the defendant's Fifth Amendment rights, once the defendant's own statements are suppressed"); *see also* State v. Yang, 608 N.W.2d 703, 712–13 (Wis. Ct. App. 2000) (noting that derivative physical evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is not "tainted fruit"). *See generally* James v. Illinois, 493 U.S. 307, 311–12 (1990) (explaining that "the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility'").

Further, given the plurality's acceptance of the principles above, it is beyond cavil that the application of the "fruit of the poisonous tree" doctrine within the context of intentional *Miranda* violations, as was the case in *United States v. Faulkingham*, is also without merit. Requiring courts to determine whether there has been a negligent or intentional *Miranda* violation would undermine the clarity of the bright-line rule that *Miranda* was designed to be and would place a difficult as well as an unnecessary burden on the courts.[273]

CONCLUSION

In *United States v. Patane*, the United States Court of Appeals for the Tenth Circuit erred on the side of excess by applying the "fruit of the poisonous tree" doctrine so as to exclude physical evidence derived from statements acquired through a negligent violation of the defendant's *Miranda* rights.[274] In so doing, the Tenth Circuit utilized the Court's holding in *Dickerson*, which merely indicated that *Miranda* was a constitutional rule[275] that could not be superseded by legislation.[276] This use of the *Dickerson* decision was not only unintended by the Court but it runs contrary to the development of both *Miranda* and the "fruit

[273] *See* Ambach, *supra* note 112, at 792 (noting that First Circuit's focus on intentional violations clouds *Miranda*'s bright-line rule). *See generally Miranda*, 384 U.S. at 473–74 (clarifying *Miranda* procedure); United States v. Gilmore, 03-CR-0030-C-01, 2004 U.S. Dist. LEXIS 4912, at *7 (W.D. Wis. March 16, 2004) (recognizing advantages of *Miranda's* bright line rule).

[274] *See* United States v. Patane, 304 F.3d 1013, 1015, 1029 (10th Cir. 2002) (concluding that rule limiting "suppression of the physical fruits of a *Miranda* violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose"), *rev'd* 124 S. Ct. 2620, 2630 (2004); *see also* Abraham v. Kansas, 67 Fed. Appx. 529, 532 (10th Cir. 2003) (acknowledging and applying Tenth Circuit's decision). *But see Gilmore*, 2004 U.S. Dist. LEXIS 4912, at *14–18 (criticizing Tenth Circuit's decision).

[275] *See* United States v. Patane, 124 S. Ct. 2620, 2628 (2004) (noting decision in *Dickerson* which classified *Miranda* as constitutional decision); Dickerson v. United States, 530 U.S. 428, 435, 444 (2000) (asserting that *Miranda* laid out constitutional guidelines for law enforcement officials and courts to follow); *see also* Bilbrew v. Garvin, 97-CV-1422 (JG), 2001 U.S. Dist. LEXIS 622, at *18 (E.D.N.Y. Jan. 10, 2001) (explaining that constitutionality of *Miranda* safeguards was made clear by Court in *Dickerson*).

[276] *See Dickerson*, 530 U.S. at 435, 444 (concluding that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively"); *see also* Renda v. King, 347 F.3d 550, 557–58 (3rd Cir. 2003) (reiterating that Congress may not pass statute that lessens *Miranda's* procedural protections); United States v. Newton, 181 F. Supp. 2d 157, 180 (E.D.N.Y. 2002) (noting that *Dickerson* decision did not destroy *Elstad*).

of the poisonous tree" doctrine.[277] Moreover, there is no sufficient policy justification that would serve to validate the suppression of physical evidence derived from an unwarned statement.[278] Thus, this Comment supports the plurality opinion by which the Supreme Court reversed the Tenth Circuit's decision in *Patane* and indicated that the "fruit of the poisonous tree" doctrine should not be applied so as to exclude evidence acquired through an unwarned statement. However, this Comment yet maintains that the non-application of the "fruit of the poisonous tree" should be logically extended to encompass not only negligent but intentional failures to administer *Miranda* warnings.

277 *See Faulkingham*, 295 F.3d at 94 (emphasizing that constitutional violations trigger concerns of fruits doctrine); *see also* United States v. Sterling, 283 F.3d 216, 218 (4th Cir. 2002) (explaining that *Dickerson* did not alter its refusal to extend "fruit of the poisonous tree" doctrine to physical evidence discovered because of unwarned statements); United States v. DeSumma, 272 F.3d 176, 180 (3rd Cir. 2001) (holding that "the fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued").

278 *See* United States v. Faulkingham, 295 F.3d 85, 91 (1st Cir. 2002) (noting that Court has discouraged use of "fruits of the poisonous tree" doctrine following *Miranda* violation, whatever the nature of derivative evidence); *see also Sterling*, 283 F.3d at 219 (stating that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"); *DeSumma*, 272 F.3d at 180–81 (finding that defendant's seized gun was admissible even though it was secured because of his non-Mirandized statement).